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No. _____

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# Supreme Court of the United States

OCTOBER TERM, 1987

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ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,

*Petitioner,*

v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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March 10, 1988

## QUESTIONS PRESENTED

The resolution of this case will determine whether the American public will continue to enjoy unobstructed access to diverse, competitive local television broadcasts, or whether the public's television viewing alternatives will instead be controlled by the single, monopoly cable television system operator in the community.

The questions presented are:

1. Whether the court of appeals erred in holding that the FCC's must-carry rules, which required cable television systems which have larger channel capacities and which serve as gatekeepers for their subscribers' viewing of television broadcast signals to carry minimum numbers of qualifying local television broadcast stations, were invalid under the First Amendment on the ground that the rules did not reflect an important and substantial governmental interest despite several acts of Congress and numerous decisions of this Court which have found that FCC regulation of cable carriage of local television broadcast signals, including the kind of mandatory-carriage rules in question here, was statutorily authorized and served the substantial governmental interest in preserving the system of free, local broadcast stations.

2. Whether the court of appeals incorrectly applied the First Amendment test in *United States v. O'Brien*, 391 U.S. 367 (1968), by requiring the Commission to prove affirmatively by substantial evidence that cable systems in the future would refuse to carry local broadcast signals to the detriment of local broadcasting absent the must-carry rules.

3. Whether the court of appeals erred by requiring the FCC to adduce "substantial evidence" in the record to support its findings in an informal rulemaking proceeding and by failing to defer to the expert predictive judgments of the FCC based on the evidence in the record.

## LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the proceedings before the court of appeals: United States of America, Federal Communications Commission, Richard S. Leghorn, Hubbard Broadcasting, Inc., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., OCB Cablevision, Inc., Ocean Associates, Riverview Cablevision Associates, St. Charles CATV, Inc., United Cable Television Corp., Office of Communication of the United Church of Christ, Spanish International Communications Corp., Univision, Inc., The National Association of Broadcasters, Lincoln Broadcasting Co., National Cable Television Association, *et al.*, Corporation for Public Broadcasting, National Association of Public Television, Public Broadcasting Service, and National Broadcasting Co., Inc.

Petitioner Association of Independent Television Stations, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1 of this Court.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Association of Independent Television Stations, Inc. ("INTV"), by its attorneys, hereby petitions for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these consolidated cases.

## OPINIONS BELOW

The opinion of the court of appeals, dated December 11, 1987, is reported at 835 F.2d 292 and reprinted in the Joint Appendix ("Jt. App.") at 1a-28a. On January 29, 1988 the court issued a clarifying *Order*, which has not been reported and which is reprinted in the Joint Appendix at 29a-31a. The *Report and Order* of the Federal Communications Commission ("FCC" or "Commission") which adopted the regulations at issue is reported at 1 FCC Rcd 864 and reprinted in the Joint Appendix at 32a-204a. The Commission's decision on reconsideration of the *Report and Order* is reported at 2 FCC Rcd 3593 and reprinted in the Joint Appendix at 205a-330a.

## JURISDICTION

The judgment of the court of appeals, reprinted in the Joint Appendix at 331a-32a, was entered on December 11, 1987. No party filed a petition for rehearing of the court's opinion and the mandate issued on February 9, 1988. Several parties jointly filed a motion to stay the mandate on February 9, 1988, and the court issued an *Order* recalling the mandate on February 22, 1988. On February 23, 1988, several parties jointly filed a petition for rehearing of the court's *Order* clarifying its opinion. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and agency regulations have been reprinted in the Joint Appendix or in the Appendix ("App.") attached to the instant petition: (i) the First Amendment to the Constitution of the United States (App., A1); (ii) Sections 1, 303(g)-(h) & (s), and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 303(g)-(h) & (s), 307(b) (App., A1-2); (iii) Section 111 of the Copyright Revision Act of 1976, 17 U.S.C. § 111 (App., A2-19); (iv) Section 624 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 544 (App., A19-21); and (v) the regulations of the Commission which were at issue below, 47 C.F.R. §§ 76.5, 76.51-76.70 (Jt. App., 177a-87a, as modified at Jt. App., 313a-32a).

## STATEMENT OF THE CASE

The Commission licenses television broadcast stations to use radio frequencies to serve the public interest by providing advertiser-supported or public-supported "free" television services to local communities. Most communities are served by several competing local commercial television stations, including stations affiliated with the three television broadcast networks (ABC, CBS and NBC) and one or more independent stations,[1] as well as by non-commercial educational stations.

Cable systems use coaxial cable to retransmit to their subscribers the signals of local television stations and other television program services which are not available to local viewers over the air. The non-local programming offered by cable systems consists primarily of the signals of distant television broadcast stations and other specialized program services. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S.

[1] Petitioner INTV is an association of independent television stations, many of which are new, financially struggling UHF stations.

691, 700-01 (1984) ("*Crisp*"). Cable television systems use FCC-assigned radio spectrum to receive program transmissions via satellite circuits and to relay signals via microwave frequencies.[2] Nevertheless, the systems themselves are not licensed by the Commission and are not subject to public interest program obligations as are broadcasters.

The coaxial cable interfaces with a subscriber's television set at the VHF antenna input. Because a subscriber's VHF antenna must be disconnected from the receiver in order to accommodate the cable input, and because cable provides clear signal reception, most television viewers dismantle their external antennas and rely entirely on the cable system to receive local television broadcast signals. (Jt. App., 98a-99a.) In addition, many apartment and other multi-family dwellings employ a "master" cable input in lieu of an outdoor antenna, making cable the only practicable means of access to local broadcast signals. The cable system thereby becomes the "gatekeeper" determining which television stations and other program services gain access to the homes of cable subscribers.[3]

The Commission first asserted jurisdiction over cable television (or "CATV") in the early 1960s because cable is a "closed" transmission medium which exploits and at the same time supplants over-the-air television reception. The Commission grounded its regulation of cable in its statutory duty to make broadcasting available "to all the

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[2] *See generally* 47 C.F.R. Part 78 (Cable Television Relay Service).

[3] Cable television has developed as a *de facto* intra-modal monopoly service. At present, fewer than one percent of the nation's cable systems experience competition from another cable system. *See Communications Daily*, Aug. 21, 1986 at 2; *see also* CATV, 20 F.C.C.2d 201, 222 n.27 (1969), *quoted in* Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 n.81 (D.C.Cir.), *cert. denied*, 434 U.S. 829 (1977) ("cable television's operations have developed on a noncompetitive, monopolistic basis in the particular areas served, with no instance, to our knowledge where a member of the public subscribes to more than one cable television service").

people of the United States," 47 U.S.C. § 151 (App., A1), to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g) (App., A1-2), to "establish areas or zones to be served by any station," 47 U.S.C. § 303(h) (App., A2), and to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same," 47 U.S.C. § 307(b) (App., A2).

The Commission's commitment to a policy of maximization and localism of broadcast service is reflected in the television channel allocations which the Commission made in 1952 to "approximate the mathematical optimum" of television broadcast channels in communities throughout the nation. *Television Assignments*, 41 F.C.C. 148, 152 (1952). The Commission declared that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Id.* at 172. Congress expressly endorsed the Commission's policy when it enacted the All-Channel Television Receiver Act of 1962.[4] Congress declared that "[t]he goal which is being sought is a television system which will serve all the people, encourage local outlets, foster competition—particularly in larger markets—and meet educational needs."[5]

To assure the integrity and fulfillment of its local broadcast channel allocation policy, the Commission first adopted regulations requiring cable systems to carry the signals of local television stations (hereinafter "must-carry rules") in 1965 and 1966. The Commission found that "the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to

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[4] Public Law No. 87-529, 76 Stat. 150 (1962), *codified as amended at* 47 U.S.C. § 303(s) (App., A2).

[5] H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962).

CATV subscribers."[6] Because such a denial of access would threaten the economic foundation of over-the-air broadcasting, the Commission held that permitting cable systems to exclude local broadcast signals was inimical to the Commission's statutory mandate to foster the general public's access to local television broadcast services.[7] The Commission concluded that it would be "[in]compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services."[8]

This Court upheld the Commission's statutory authority to regulate cable television in 1968. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) ("*Southwestern*"). Later the same year, the United States Court of Appeals for the Eighth Circuit expressly upheld the constitutionality of the must-carry rules under the First Amendment. *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968) ("*Black Hills*"). Moreover, while the must-carry rules were in effect, Congress and the Commission adopted several measures designed to assist the development of the cable television industry. Among others, Congress created a compulsory copyright license in 1976 to permit cable systems to retransmit local television broadcast signals free of charge and to retransmit the signals of distant stations upon payment of a fixed royalty to the United States Copyright Office. 17 U.S.C. § 111 (App., A2-19). In 1980 the Commission permitted cable systems to import an unlimited number of distant television signals.[9] Four years

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[6] CATV, 2 F.C.C.2d 725, 736 (1966), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

[7] CATV First Report and Order, 38 F.C.C. 683, 702-03 (1965).

[8] *Id.* at 699.

[9] CATV Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom.* Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir.

later Congress enacted the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, which bestowed various privileges and protections upon cable operators while at the same time largely deregulating cable systems.[10] The 1984 Cable Act shielded cable systems from governmental "requirements regarding the provision or content of cable services" except as provided under the Act,[11] but it expressly retained the Commission's must-carry rules.[12]

In *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986) ("*Quincy*"), the U.S. Court of Appeals for the District of Columbia Circuit struck down 20 years of must-carry regulation as violating the First Amendment rights of cable operators. The court rejected the Eighth Circuit's earlier affirmance of the rules under the First Amendment and distinguished this Court's prior statements approving the rules and the substantial governmental interest they promoted. Addressing at length the question of what First Amendment standard governs cable television, 768 F.2d at 1447-54, the court strongly suggested that the most appropriate degree of protection is that accorded to the editorial discretion of newspapers under *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) ("*Miami Herald*").

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1981), *cert. denied sub nom.* National Football League v. FCC, 454 U.S. 1143 (1982).

[10] *E.g.*, 47 U.S.C. § 533 (protecting incumbent cable operators from competition from telephone companies and others); §§ 543, 544 (generally prohibiting regulation of cable rates and services); § 546 (requiring renewal of cable franchises unless local communities undertake complex administrative proceedings).

[11] 47 U.S.C. § 544(f) (App., A21).

[12] 47 U.S.C. § 544(f)(2)(A) (App., A21). *See* S. Rep. No. 67, 98th Cong., 1st Sess. 11-12 (1983); H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984).

Despite its inclination to apply the *Miami Herald* standard, the court rejected the Commission's must-carry rules by purporting to measure them against the First Amendment standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"), for content-neutral regulations imposing incidental burdens on speech. The court held that *O'Brien* subjected the Commission to a "heavy burden of justification" for its predictive judgment that such rules were necessary to prevent a harmful diminution of local television service to the general public. 768 F.2d at 1462. The court then struck down the must-carry rules on the ground that the Commission had failed to prove that the rules reflected a "substantial or important governmental interest." *Id.* at 1454-59.

The *Quincy* court also held that the must-carry rules did not pass muster under the fourth requirement of the *O'Brien* test, 391 U.S. at 377, that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the [substantial government] interest." 768 F.2d at 1459-62. The court held that the rules were "'grossly' overinclusive" because they "indiscriminately sweep into their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community." *Id.* at 1460, 1463. The *Quincy* court attached particular importance to the view that "an inexpensive switch (the 'A/B switch') would enable a viewer to alternate between cable and off-air VHF signals," thereby permitting "a cable subscriber with little or no effort [to] view local broadcasts even without the benefit of the must-carry rules." *Id.* at 1441, 1457 n.48.

Several broadcast station licensees and associations petitioned this Court for a writ of certiorari to review the *Quincy* decision. Choosing not to file such a petition, the Commission—in response to the invitation of the court of appeals, to rulemaking petitions filed by commercial and

public television interests, and to a request by several congressional leaders[13]—instead instituted a proceeding in November, 1985 to consider adopting modified must-carry rules. Thereupon the Commission and the Solicitor General advised this Court that they viewed the new must-carry proceeding as obviating grant of certiorari in *Quincy*,[14] and the Court later denied the outstanding certiorari petitions, 476 U.S. 1169 (1986). That denial came one week after the Court, in another case involving the issue of cable television's First Amendment rights, declined to express any "detailed views on the proper resolution of the First Amendment question" and remanded the case to the trial court for "a fuller development of the disputed issues in the case." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986).

On August 7, 1986, the Commission adopted new, temporary and more narrowly drawn must-carry rules and "consumer education" requirements for larger cable systems. (Jt. App., 32a-204a.) The new must-carry rules were largely modeled upon a "joint industry agreement" (*see* Jt. App., 48a) submitted by the principal associations of the cable and broadcast television industries. Both the industry agreement and the Commission's rules generally provided that: (1) the rules would apply only to cable systems with 21 or more usable activated channels;[15] (2) those cable systems would be required to devote no more than 25 percent of such usable channels to carriage of local television broadcast signals;[16] (3) that in order to qualify

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[13] *E.g.*, Letter from Senator Barry Goldwater, Chairman, Senate Telecommunications Subcommittee, to FCC Chairman Mark S. Fowler, dated Sept. 13, 1985.

[14] Memorandum for the Federal Respondents in *National Association of Broadcasters v. Quincy Cable TV, Inc.*, No. 85-502, filed Nov. 21, 1985 (S. Ct.).

[15] 47 C.F.R. § 76.56(a) (Jt. App., 180a).

[16] *Id.* An exception to the 25 percent limit was that cable systems

for carriage, a television station would have to be licensed to a community within 50 miles of the cable system,[17] it would have to deliver a "high quality" signal to the system,[18] and, if it were a commercial station, it would have to demonstrate a significant level of viewership in non-cable households in the county served by the cable system.[19] Even qualifying commercial stations would not be guaranteed carriage by the cable system, since the choice of commercial stations to be included in the 25%-of-channel-capacity "quota" would remain in the sole discretion of the cable system operator.[20]

Several elements of the Commission's new rules departed from those proposed by the cable/broadcast industry agreement. The Commission adopted the rules only on a temporary basis and ordained an automatic "sunset" of all must-carry regulation after five years,[21] although it resolved to initiate a rulemaking prior to that time to consider situations where mandatory carriage rules might continue to be necessary. (Jt. App., 110a.) Further, carriage of at least one or two public television stations was non-discretionary,[22] and new commercial stations were held exempt from the viewership standard for their first year of operation in order to permit them to establish an au-

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with between 21 and 27 usable activated channels were required to devote seven of those channels to must-carry signals. *Id.*

[17] 47 C.F.R. § 76.5(kk) (Jt. App., 178a). Further, a cable system was not required to carry any station if such carriage would subject the system to payment of distant signal copyright fees. *See* 47 C.F.R. § 76.56(c)(2) (Jt.App., 181a).

[18] 47 C.F.R. § 76.56(c)(3) (Jt. App., 181a).

[19] 47 C.F.R. § 76.5(d)(1)(ii) (Jt. App., 177a).

[20] 47 C.F.R. § 76.56(b) (Jt. App., 180a).

[21] The expiration date of the must-carry rules was to be June 10, 1992. *See* Amendment of Part 76, FCC DA 87-1665, rel. Nov. 23, 1987 (Erratum).

[22] 47 C.F.R. § 76.56(a)(1), (b) (Jt. App., 180a-81a).

dience base.[23] Finally, the Commission adopted "input selector switch" and "consumer education" provisions which required cable systems, *inter alia*, to inform their subscribers how to view broadcast signals that were not carried on the system by installing and using an "input selector" or "A/B" switch. Cable operators were required to offer to sell and/or install such a switch at the subscriber's expense.[24]

In response to the apparent holding of the court of appeals that broadcast localism had ceased to constitute a substantial governmental interest on the facts in *Quincy*, the Commission, while adhering to its former view that the must-carry regime "contributes toward [those] statutory goals" (Jt. App., 95a), justified the new, temporary rules as necessary to promote "the governmental interest in maximizing diversity of program choices and in fostering competition among program sources." (Jt. App., 148a-49a.) The Commission found that the must-carry rules were necessary on an interim basis to "ensure that broadcasting has a fair opportunity to compete with cable." (Jt. App., 147a.)

At the same time, the Commission accepted the view that installing an inexpensive A/B switch would give cable subscribers full and direct access to over-the-air broadcast signals. The fact that cable subscribers do not believe they have that capability, the Commission held, is only a "misperception" of cable's technological possibilities. (Jt. App., 105a.) The Commission recognized that it would take a considerable period of time to educate cable subscribers and to provide them a sufficient opportunity to acquire the A/B switch capability. (Jt. App., 109a.) Accordingly, the Commission ruled that the new must-carry rules would

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[23] 47 C.F.R. § 76.5(d)(1)(ii) (Jt. App., 177a).

[24] 47 C.F.R. §§ 76.66, 76.70 (Jt. App., 185a-87a, 316a-19a & 320a-21a).

be necessary only "until it can be assured that viewers have the knowledge and capability to receive off-the-air signals not carried on cable," and that such assurance could be reasonably assumed in a period of five years. (Jt. App., 147a.)

Although the principal cable television industry associations did not petition for review of the Commission's new must-carry rules,[25] a group of cable television companies and a cable television investor filed such petitions on First Amendment grounds. One broadcaster appealed on the ground that the rules were too narrow.

The court of appeals reviewed the Commission's decision under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344 in *Century Communications Corporation v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) ("*Century*") (Jt. App., 1a-28a). Again purporting to use the *O'Brien* test, the court in *Century* rejected the Commission's reasoning, found the evidence supporting the new must-carry rules to be unconvincing, and struck down those rules as violative of cable operators' First Amendment rights.[26] The *Century* court seized upon the Commission's new rationale for the must-carry regime and found that such a rationale, as it did the Commission's previous one of promoting broadcast localism, was not a substantial and important governmental interest. (Jt. App., 18a-26a.) It held that the substantial deference normally accorded to the Commission's expert judgment has "little relevance when first amendment interests are even incidentally at stake" (Jt. App., 16a), and held that the Commission had not met its burden to adduce "substantial evidence" (Jt. App., 18a) to prove that the asserted governmental interest was substantial or that the new must-

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[25] The National Cable Television Association, *et al.* ("NCTA"), intervened but did not file a brief on the merits.

[26] Upon a request by the Commission, the court issued an Order (Jt. App., 29a-31a) clarifying that its decision left the Commission's input selector switch and consumer education requirements in place.

carry rules were narrowly tailored to serve that interest. As in *Quincy*, the court rejected the Commission's decision on the ground that "the need for a new saga of must-carry rules is more speculative than real." (Jt. App., 18a.)

Although the *Century* court sought to characterize its decision as a "narrow one" and disclaimed any interpretation of its decision as rendering must-carry rules *per se* unconstitutional, (Jt. App., 28a), the court's opinion gave no reason for confidence that any future rulemaking effort by the Commission could ever meet with court approval. The Chairman of the Commission recently expressed his belief that the Commission had done all it could to craft constitutional must-carry rules, thus casting considerable doubt upon whether the Commission will undertake to devise new must-carry rules.[27]

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW IS ESSENTIALLY IN CONFLICT WITH DECISIONS OF THIS COURT AND IS IN DIRECT CONFLICT WITH A DECISION OF THE EIGHTH CIRCUIT

The decision below virtually ignores and is in derogation of several decisions of this Court upholding the broad authority and duty of the Commission to regulate the carriage of television broadcast signals by cable television systems, including mandatory carriage of local television signals. Moreover, the decision below is in direct conflict with a decision of another circuit and numerous decisions of this Court approving the Commission's must-carry rules.

The *Quincy* and *Century* decisions are squarely contrary to the decision in *Black Hills*, where the court expressly held that an earlier version of the must-carry rules was

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[27] *See Communications Daily*, Dec. 14, 1987 at 1; *Broadcasting*, Feb. 8, 1988 at 111.

permissible under the First Amendment. Its ruling was based on "the crucial consideration . . . that [cable systems] use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service." 399 F.2d at 69. The rules upheld in *Black Hills* were, in essence, the same rules invalidated on First Amendment grounds in *Quincy*, and they were far more comprehensive and intrusive than the rules struck down in *Century*. It is undisputed that the court below used a more stringent First Amendment test than *Black Hills*, and this Court should grant certiorari to resolve the conflict between those decisions.

Apart from its inconsistency with *Black Hills*, the decision below is essentially in conflict with the decisions of this Court, which have approved the must-carry rules in an uninterrupted line of decisions dating from 1968. In *Southwestern*, this Court upheld the Commission's authority to regulate the carriage of television broadcast signals by cable systems. The Court stated

> "[t]he Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of [cable] systems." 392 U.S. at 177.

That holding, while based on statutory rather than constitutional grounds, specifically recognized the substantial governmental interest promoted by the Commission's regulation of cable television.

In *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17. (1972) (plurality) ("*Midwest*"), this Court went

further and recognized that *Black Hills* "correctly upheld" the must-carry rules. The Court stated that those rules were justified by the need " 'to promote maximum television service to all people of the United States . . . , both those who are cable viewers and those dependent on off-the-air service.' "[28]

In *Crisp*, this Court again discussed the must-carry rules at length. 467 U.S. at 701-03, 705-06. The Court stated that "[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the Commission to govern signal carriage by cable television systems reflect an important and substantial federal interest." *Id.* at 714. The Court emphasized that

> "[i]n crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Id.*

The court of appeals discarded those rulings when it first invalidated the Commission's must-carry rules in *Quincy*. Contrary to this Court's consistent rulings, the court below found in *Quincy* that the rules did not reflect a substantial governmental interest. The court held that the Commission had "fall[en] far short" of proving "the

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[28] *Id.* at 666 (*quoting* CATV, 2 F.C.C.2d 725, 746 (1966)). As Chief Justice Burger wrote in his decisive concurring opinion, 406 U.S. at 676,

> "Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission."

substantiality of the interest served by the rules." 768 F.2d at 1457. Indeed, the court of appeals went further to make a distinction—one never made by this Court for must-carry purposes—between Commission protection of local broadcast*ing* and Commission protection of local broadcast*ers*. *Id.* at 1460. Holding that the Commission's only legitimate objective was the protection of local broadcast*ing*, the *Quincy* court opined that it was not necessary for all local television signals to be carried by cable systems in order to serve "the asserted interest of assuring an adequate amount of local broadcasting in the community." *Id.* at 1463. Thus, while paying lip service to *Southwestern*'s recognition "that the elimination of local service is a 'matter of real and immediate public concern,' "[29] the court in *Quincy* eliminated 20 years of Commission must-carry regulation which, as this Court repeatedly recognized, served that fundamental objective.

The court in *Century* confirmed *Quincy*'s holding that the Commission's must-carry rules did not promote a substantial governmental interest. It embraced *Quincy*'s most extreme language, declaring unequivocally that must-carry regulation based on the need to "safeguard the diverse programming generated by protecting local broadcasts . . . was foreclosed by *Quincy Cable TV* . . . ." (Jt. App., 16a n.4.)[30] The court went on to reject the Commission's new

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[29] *Id.* at 1454 n.43 (*quoting Southwestern*, 392 U.S. at 173 & n.38).

[30] The *Quincy* court had said that it is "critical" that must-carry rules "seek to protect local broadcast*ing* and not local broadcast*ers*," and that the purpose of the Communications Act is not to protect a licensee against competition but to protect the public. 768 F.2d at 1460 (emphasis in original). Agreeing that the Act was not intended to protect a licensee against competition, broadcasters argued that mandatory carriage of local stations is needed to assure competition among television broadcast stations and to assure competition between those broadcast stations and cable systems. The public interest in broadcast*ing*, which exists concretely only in the form of broadcast*ers*, is thus served by must-carry rules.

must-carry regime, which was substantially limited both in scope and duration, on the ground that the Commission, again, had "not demonstrated that the new must-carry rules further a substantial governmental interest . . . ." (Jt. App., 26a.)

Thus, despite this Court's articulation of the important and substantial federal interest in mandating carriage of local television signals in *Southwestern*, and its reaffirmation only four years ago in *Crisp* that "[t]here can be little doubt" of the substantiality of that interest, 467 U.S. at 714, the court of appeals struck down two sets of must-carry rules on a finding that no such interest exists. This Court should grant certiorari to reassert and clarify the Commission's now uncertain authority to adopt regulations governing cable television carriage of broadcast signals.

## II. THE DECISION BELOW PRESENTS IMPORTANT CONSTITUTIONAL AND STATUTORY ISSUES WHICH THIS COURT SHOULD RESOLVE

### A. This Court Should Grant Certiorari To Determine Whether The Court Below Was Correct In Its Application Of The *O'Brien* Test And In Rejecting The Expert Judgments Of The FCC

The court of appeals had doubts as to the propriety of using the *O'Brien* standard rather than the more elevated First Amendment test of *Miami Herald*. The result was that it applied a heightened form of *O'Brien* scrutiny that was close to being the functional equivalent of *Miami Herald*. Never has this Court subjected an "incidental" burden on speech to such intense scrutiny, or required it to have such an exacting empirical basis, as did the court of appeals in striking down the must-carry rules in *Quincy* and *Century*.[31]

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[31] Unlike newspapers, cable television has enjoyed no tradition of freedom from federal regulation. To the contrary, various aspects of cable operations have long been subject to regulation by the Commis-

When the *Quincy* court struck down the original, comprehensive must-carry rules, it offered an olive branch by inviting the Commission to seek to "recraft the rules in a manner more sensitive to the First Amendment . . . ." 768 F.2d at 1463. The court assured the Commission that if the agency "move[d] beyond its 'more or less intuitive model' . . . we would be extremely hesitant to second-guess its expert judgment." *Id.* at 1459. In response, the Commission compiled a voluminous rulemaking record and, on the basis of record evidence, fashioned far narrower, less intrusive must-carry rules to satisfy the court's First Amendment concerns. This evidence included showings that some cable systems had ceased to carry local stations and/or demanded payments in return for carriage;[32] studies which showed that virtually no cable subscribers engaged in the practice or even possessed the capability of switching between cable and off-the-air broadcast reception (Jt. App., 49a-66a); and the statistical fact that cable systems "affect almost one-half of the potential audience for broadcast television service in communities nationwide" (Jt. App., 100a). Based on this record, the Commission held

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sion, *see* 47 C.F.R. Part 76, and by Congress, *see* Cable Communications Policy Act of 1984, *supra* at 6. In the 1984 Cable Act, Congress mandated, *inter alia*, that cable systems set aside access channels for both public and commercial use, *see* 47 U.S.C. §§ 611-12, devoting a substantial amount of the legislative history of the Cable Act to explaining its view that such requirements are consistent with and indeed promote the First Amendment. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 31-36 (1984).

[32] Public television interests cited 185 cases of public stations being dropped by cable systems serving 3.2 million people. *See* Opposition of Corporation for Public Broadcasting, *et al.*, filed Feb. 17, 1987 at 11 n.12. INTV's Comments in the same proceeding cited numerous examples of anticompetitive deletions of local signals by cable systems, including several where the stated purpose of the deletion was to rid the cable operator of a competitor for local advertising revenues or to persuade advertisers to patronize the cable system instead of a station that would not be seen by the system's subscribers. *See* INTV Comments, filed Jan. 29, 1986 at 59-67.

that the new rules were "necessary as interim measures to preserve the availability of the program choices to consumers, including broadcasters, and to ensure that broadcasting has a fair opportunity to compete with cable . . . ." (Jt. App., 147a.)

It is undisputed that the new rules were tailored closely to the concerns expressed by the *Quincy* court. For example, while *Quincy* found "especially troubling" that the prior rules drew "no distinction between cable systems that carry 100 signals and those that carry 12,"[33] the new rules provided that cable systems with limited channel capacity (*i.e.*, fewer than 21 channels) were free of any must-carry obligations. Moreover, the Commission generally did not require larger systems to devote more than 25 percent of their channels to local broadcast signals. (Jt. App., 180a.) Thus, the typical cable system of 54 channels would have absolute discretion over at least 40 of those channels.

Another example is the *Quincy* court's objection that the previous rules required cable systems to carry signals regardless of their importance to local broadcasting in the community and even when they showed duplicative programming. 768 F.2d at 1460. Under the Commission's post-*Quincy* rules, cable systems were required to carry only stations with demonstrated popularity in the community, and they were not required to carry duplicative programming. *See supra* at 9. Thus, the Commission conscientiously tried to craft new rules in response to *Quincy* which preserved at least a substantial part of local broadcasting without the "undifferentiated sweep" of its previous rules, *id.* at 1461.

The decision below shows the hollowness of the *Quincy* court's purported guidance to the Commission. Where *Quincy* stated that the court of appeals would be "extremely hesitant to second-guess [the Commission's] expert

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[33] 768 F.2d at 1462 n.55; *see also id.* at 1451-52, 1460.

judgment," the court in *Century* noted peremptorily that deference to the agency's expert judgment "has little relevance when first amendment freedoms are even incidentally at stake." (Jt. App., 16a.) In fact, the court completely disregarded the Commission's expert judgment—and the record supporting it—in holding that must-carry rules are not needed to prevent cable systems from dropping local broadcast signals.

The Commission found that while cable systems did not jettison all or even most of the broadcast signals they carried,"there is evidence in the record that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations." (Jt. App., 104a.) In the Commission's judgment, that conduct supported its decision to retain a limited version of the must-carry rules, particularly since the previous must-carry rules had been in abeyance for only a short time, and since cable systems had been told to avoid the widespread dropping of signals while the Commission's rulemaking was still in progress. *Id.*

In the guise of applying the *O'Brien* test, the court of appeals in *Century* rejected the Commission's rationale on the ground that the existing evidence was insufficient to prove with certainty that cable systems would actually drop broadcast signals in the absence of must-carry rules. (Jt. App., 25a-26a.) The court seized upon the fact that many cable systems had not dropped local signals in the aftermath of *Quincy* and downplayed the extent to which that behavior was affected by the Commission's pending rulemaking proceeding to consider new must-carry rules. The court particularly relied upon the positions of the Federal Trade Commission and the Department of Justice that the must-carry rules were not necessary. *Id.* The court below held the Commission to a "substantial evidence" test even when making the threshold determination of whether

the governmental interest is important (Jt. App., 18a),[34] all the while giving no deference to the Commission's expert evaluation of the record evidence.

These crucial conclusions of the court of appeals are irreconcilable with the decisions of this Court applying the *O'Brien* test. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (*"Clark"*), this Court upheld the National Park Service's prohibition on sleeping in public parks as a reasonable time, place or manner restriction. The Court noted that

> "[i]f the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment . . . ." *Id.* at 297.

The court below simply ignored that holding. As this Court has recognized on numerous occasions, local broadcasting clearly is "exposed" to more harm without must-carry rules than with them. Just as the *Clark* Court held that *O'Brien* does not "endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be maintained," *id.* at 299, neither does *O'Brien* permit courts to determine what measures are or are not necessary to preserve our system of local broadcasting in the United States.

In *United States v. Albertini*, 472 U.S. 675 (1985) (*"Albertini"*), involving the constitutionality of military bar orders, this Court did not require proof that the harm to

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[34] The court's use of the "substantial evidence" test was contrary to the well-established rule that informal rulemaking, such as the Commission's must-carry rulemaking, is governed only by the more lenient arbitrary and capricious standard. *See* FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 803 (1978).

be prevented would necessarily occur without the challenged regulation. The Court held that,

> "[n]othing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house." 472 U.S. at 675.

Similarly, *O'Brien* does not require the Commission to wait until local broadcasting has actually suffered widespread injury, which the *Century* court required as proof of a substantial governmental interest, before acting to prevent the harm. Indeed, the original must-carry rules were premised on the Commission's judgment not to wait for the "bodies to pile up" before acting to address the problem.[35]

The *Clark* and *Albertini* decisions are consistent with the general rule established by this Court (and applied in FCC cases) that the predictive judgments of an expert agency are entitled to substantial judicial deference, particularly where "complete factual support in the record for the Commission's judgment or prediction is not possible."[36] This Court has consistently held that the Commission may regulate cable television to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[37] Congress created the Commission to be the "single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication," and it "therefore gave the Commission a comprehensive

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[35] CATV First Report and Order, 38 F.C.C. at 701. *See supra* note 32.

[36] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-96 (1981).

[37] *Southwestern*, 392 U.S. at 178; *Midwest*, 406 U.S. at 649.

mandate with not niggardly but expansive powers."[38] More specifically, Congress expressly retained the FCC must-carry rules when it prohibited other forms of regulation in the 1984 Cable Act. *See supra* at 6.

With particular reference to the must-carry rules, this Court in *Southwestern* observed that the Commission "could not predict with certainty the consequences of unregulated CATV," but nevertheless approved the Commission's judgment that "its statutory responsibilities demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.' "[39] The Commission has never before been held to the "heavy burden"[40] of affirmatively proving what will happen to the nation's system of free, locally oriented television in the future if all regulation of television signal carriage by cable systems were removed, nor has the Court found that the Commission's judgments could be undercut by less expert agencies.

The burden placed on the Commission by the court of appeals under the *O'Brien* test—to prove positively that widespread serious injury to free local broadcasting will occur to a certainty if the regulatory checks in place to prevent such injury are removed—is an impossible one to meet. Indeed, the Chairman of the Commission recently interpreted *Quincy* and *Century* to require the Commission to produce evidence showing that must-carry rules are necessary to prevent substantial harm to "the industry generally" before the Commission may regulate cable signal carriage. *See supra* note 27. Given the court's unequivocal rejection of the sharply-limited interim rules in *Cen-*

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[38] *Southwestern*, 392 U.S. at 168, 173; *Midwest*, 406 U.S. at 660, 661 (footnotes and citations omitted).

[39] 392 U.S. at 176-77 (*quoting* CATV First Report and Order, 38 F.C.C. at 701).

[40] *Quincy*, 768 F.2d at 1462.

*tury*, its application of the *O'Brien* test is not just a hurdle to be overcome, it is a stone wall.

B. The *Quincy* And *Century* Decisions Have Induced The Commission To Abandon The Public Interest Rationale For The Must-Carry Rules Which Has Been Approved By This Court In Several Decisions

It is apparent that *Quincy* misled the Commission into altering its rationale for must-carry rules from one which this Court had consistently approved to the weaker, substitute rationale that was rejected by the court below. In evident response to *Quincy*, the Commission's rationale for more limited post-*Quincy* rules did not rely on the statutory provisions mandating that the Commission foster and maximize locally oriented, free broadcast television services. Instead, while the Commission briefly alluded to Sections 1, 303 and 307(b) of the Communications Act and stated that its new regulatory scheme "contributes to [these] statutory goals" (Jt. App., 95a), the agency stated that its "assessment of the federal interest . . . is different from that relied upon by the Commission, i.e. Section 307(b), in initially adopting the former must carry rules." (Jt. App., 96a-97a.)[41]

Having abandoned the bedrock rationale for must-carry rules repeatedly endorsed by this Court, the Commission was left to justify its revised rules on the amorphous substitute rationale of "the governmental interest in maximizing diversity of program choices and in fostering competition among program sources." (Jt. App., 148a-49a.)

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[41] Thereafter, the Chairman of the Commission wrote to congressional committee chairmen: "With respect to the Commission's 'failure' to rely upon the concepts of localism and Section 307(b), I must point out that these two theories *did*, in fact, form the basis of the Commission's original must-carry rules. But [*Quincy*] makes clear that the desire to protect local broadcast*ing* alone does not justify must-carry" (first emphasis in original; second emphasis supplied). Letter From FCC Chairman Dennis Patrick to the Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, dated Feb. 23, 1988.

The Commission's long-term vehicle for achieving such diversity and competition after a five-year period of limited must-carry rules was the A/B switch which the Commission had only two years previously and for 20 years prior to *Quincy* steadfastly adjudged inadequate to assure cable subscribers effective access to local broadcast signals.[42] However, the A/B switch had been elevated as a solution by the *Quincy* court, which based its invalidation of the prior must-carry rules in substantial part on the supposed availability of such a simple and effective switch.[43]

In response, the Commission not only reversed its long-held view of A/B switches, but made the A/B switch the cornerstone of its new regulatory program. In so doing, the Commission frankly acknowledged the influence of *Quincy* (Jt. App., 127a). On reconsideration, the Commission held fast to its new-found faith in A/B switches to equalize competition between cable and local broadcasting. The Commission disregarded the fact that the cable industry's principal trade associations and numerous cable system operators, which previously had championed the switches as obviating the need for must-carry rules, now shunned this solution, joined broadcasters in preferring must-carry rules to A/B switches, and filed voluminous studies which persuasively demonstrated numerous serious deficiencies in the switch. (Jt. App., 211a-15a.)[44] Unfazed

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[42] *See, e.g.*, Cable Television Mandatory Signal Carriage Rules, 55 Rad. Reg. 2d (P&F) 1365, 1367 (1984) ("It is contended that the existence of an A/B switch would be a satisfactory substitute for the mandatory carriage rules . . . . Our extensive experience . . . suggests otherwise; even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability"); CATV First Report and Order, 38 F.C.C. at 702 ("the sheer inconvenience of switching is an obvious deterrent to its use by the subscriber").

[43] *See* 768 F.2d at 1441, 1452-53, 1457 n.48.

[44] *See* Joint Petition for Reconsideration of NCTA, Community Antenna Television Association and National Association of Broadcasters

by the damning testimony concerning the inadequacy of A/B switches from both sides of the controversy,[45] the Commission noted again that the switch "was part of the *Quincy* court's findings," stated that the A/B switch problems cited by the industries were "much overstated," and affirmed its reliance on switches alone to assure even-handed competition between broadcasting and cable after the sunset of the limited remaining must-carry requirements in 1992. (Jt. App., 233a-37a.)

While the Commission's conversion regarding the A/B switch was clearly designed to satisfy *Quincy*, the attempt backfired. The *Century* court accepted uncritically the Commission's new faith in the switch and held that the Commission was unjustified in reinstituting even a limited and temporary must-carry rule. The court overlooked or disregarded the fact that the cable industry, which had convinced the *Quincy* court that the switch removed the need for must-carry regulation, had since repudiated the switch and presented evidence of its patent defects and inadequacies. These matters were brought to the court's attention most forcefully in the briefs of intervenors.[46]

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("NAB") (with attached NCTA Engineering Committee Report), filed Dec. 17, 1986. The NCTA report found (at 20) that the switches are notoriously prone to mechanical failure, corrode rapidly, yield a seriously degraded signal quality and noticeable interference due to inadequate "isolation" (*i.e.*, separation of the cable signal input for the off-air signal input), and concluded that dependence on switches are "certain to lead to frustration, confusion and dissatisfaction on the part of viewers." *See also* Petition for Reconsideration of Adelphia Communications, *et al.*, filed Jan. 12, 1987 (*discussed in* Jt. App., 215a-17a); Petition for Reconsideration of Gill Industries, Inc., filed Jan. 12, 1987.

[45] *See also, e.g.*, Comments of NAB, filed Jan. 29, 1986; Comments of INTV, filed Jan. 29, 1986; Comments of Television Operators Caucus, filed Jan. 29, 1986.

[46] *See* Brief and Reply Brief of Intervenor Office of Communication of the United Church of Christ, No. 86-1683, filed July 20,1987 and Sept. 11, 1987, respectively, (D.C. Cir.). *See also* Brief of NAB and INTV, No. 86-1683, filed Aug. 25, 1987 (D.C. Cir.) at 2 n.2, 5 & n.5, 24 & n.19.

The inadequacy of A/B switches, and the judicial pressure that led the Commission to rely upon them, are especially crucial because cable operators are intra-modal monopolies in almost every community in the nation. As such, these monopoly cable operators are "gatekeepers" of over-the-air television signals for their subscribers. *See supra* note 3. Typically the cable installer or the subscriber removes any external antenna for off-air broadcast reception when the cable is connected to the subscriber's television receiver. Consequently, unless (1) cable subscribers maintain and reconnect their VHF and UHF off-air antennae or purchase new antennae, (2) they also purchase A/B switches to alternate between cable and antenna-assisted off-air reception, *and* (3) the switches actually work reliably, efficiently and without inconvenience to the subscriber to restore unimpeded broadcast station reception, subscribers will have inadequate access to local broadcast television news, information and entertainment programming which the gatekeeper cable operator, acting in its own economic self-interest, chooses not to carry. Indeed, many consumers who subscribe to cable in order to gain satisfactory reception of local signals will not be able to achieve such reception even with an effective switch.[47]

As a practical matter, absence of carriage of a television station on a cable system is tantamount to non-reception of that station by subscribers of the cable system. And with cable television now serving more than half of the nation's total television households,[48] it is clear that such non-carriage would be devastating and often lethal to a local advertiser supported station's audience and advertising revenue base, or to a local educational station's audience and contributor base.

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[47] *See supra* at 17; *see also* Affidavit of Muriel Henle Reis, *submitted with* Response to Petition for Rehearing, filed by INTV and NAB on March 3, 1988 in Nos. 86-1683, *et al.* (D.C. Cir.).

[48] *See Communications Daily*, Nov. 25, 1987 at 7.

It is equally clear that cable operators have direct economic incentives to favor carriage of specialized cable program services, on which they sell local advertising spots,[49] and disfavor carriage of local free television stations (or relegate their carriage to channel positions distant from those of other popular program services), inasmuch as the local stations are seen as competitors for local advertising dollars.[50] Importantly, many of the nation's largest cable conglomerates own all or part of these cable services, and so have a natural and overriding proprietary interest in maximizing viewership of these services as against local broadcast services.[51]

The situation today is one of total regulatory impotence, resulting from a bizarre case of the court of appeals and the Commission misdirecting each other—the court by indicating in *Quincy* (and declaring outright in *Century*) that must-carry rules based on the statutory goal of fostering and maximizing free, local broadcasting service are "foreclosed" to the agency (Jt. App., 16a n.4); the Commission

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[49] *See, e.g., New York Times*, Feb. 17, 1988 at D18 (describing increases in cable advertising, local commercial insertions in program services).

[50] *See* discussion *supra* at note 32. As one cable operator explained his deletion of a local station: "Of course, as an advertising medium, we are competitors with WTGS. And as a business, it doesn't make sense to subsidize a competitor if you don't have to." INTV Comments at 60, *quoting Island Packet* (Hilton Head, S.C.), Aug. 30, 1985, p. 2-C. *See also, e.g., Multichannel News*, Feb. 17, 1986 at 1 ("once cable penetration exceeds 60 percent in a market, then the cable system can compete on an equal footing with local independent stations, . . . 'with no FCC license to worry about, no transmitter . . . without all those things that go with an FCC license.' "); *Multichannel News*, April 14, 1986 at 43 (cable operator-owned channel "could compete for ad dollars very effectively with local broadcast stations, particularly if those stations are denied carriage on the cable system or are relegated to less attractive channel positions at the high end of the dial").

[51] *See Broadcasting*, Feb 29, 1988 at 41. *See also Multichannel News*, Oct. 20, 1986 at 28A; *Communications Daily*, Nov. 10, 1986 at 3.

by responding to its constricted options with a tortured rationale built around the *Quincy*-approved A/B switch, which, according to all but the agency and the switch manufacturers,[52] is woefully unsuited to its assigned task; and the court again, by using the Commission's forced conversion to the dubious virtues of the A/B switch to invalidate the remaining must-carry element of the agency's regulatory policy. Now, even as the Commission continues to grapple with the increasingly evident fact that the A/B switch is wholly inadequate as a substitute for signal carriage requirements,[53] the agency is reluctant to try yet again to fashion a rule that will satisfy the prohibitive standards of the court of appeals.

Accordingly, this case presents an exceptionally important question of federal statutory and constitutional law which should be answered by this Court, lest the Commission neglect its congressionally mandated responsibility to preserve and foster the growth of free broadcast service and to assure a fair distribution of broadcast stations to communities across the nation.

C. The Court Below Ignored the Interrelationship Between Commission Signal Carriage Rules and the Federal Copyright Scheme for Carriage of Such Signals

The court's invalidation of the must-carry regulations involves another statutory conflict. The operation of those rules was an integral part of the predicate for the compulsory copyright license that Congress has bestowed on cable television retransmissions of television broadcast sig-

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[52] *See* Jt. App., 230a-31a, 235a-36a (*citing* comments of A/B switch manufacturer Pico Macom, Inc., filed Jan. 21, 1987).

[53] The increasing uncertainty over the technical viability of A/B switches led the Commission to stay implementation of its previous adoption of technical standards for such switches. *See* Amendment of Part 15 of the Commission's Rules, FCC 88-27, Gen. Docket No. 87-107, rel. Jan. 28, 1988 (Order Granting Stay Request).

nals in the Copyright Revision Act of 1976.[54] Under Section 111 of the 1976 Act, 17 U.S.C. § 111 (App. A2-19), cable systems are entitled to retransmit an unlimited number of local television broadcast signals at no cost, while paying low, statutorily prescribed royalties into the U.S. Copyright Office for the right to carry distant television signals. Thus, cable operators are totally insulated from marketplace negotiation, with an absolute, government-guaranteed right to exhibit the entire inventory of programs shown on television broadcast stations anywhere.

As early as 1970, the Commission recommended that Congress "adopt a provision that a CATV system shall have a compulsory license for such signals as the Commission, by rule or order, may authorize the system to carry."[55] In late 1971, the broadcasting, cable television and program supply industries submitted to the Commission their negotiated agreement to an overall regulatory scheme for cable that included must-carry rules and support for cable copyright legislation establishing a compulsory license for cable system retransmissions of broadcast signals. The importance of the latter element and its interrelationship with the Commission's regulatory program for cable was emphasized by the Commission in incorporating the agreement without change in its comprehensive cable television regulations issued in 1972.[56]

Now, post-*Century*, cable systems enjoy the enormous government-bestowed benefit of carrying unlimited amounts

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[54] Pub. Law No. 94-553, 90 Stat. 2541.

[55] Letter from FCC Chairman Dean Burch to Senators Warren G. Magnuson, Chairman, Senate Commerce Committee, and John O.Pastore, Chairman, Senate Subcommittee on Communications, dated March 11, 1970.

[56] *See* Cable Television Report and Order, 36 F.C.C.2d 143, 166 (1972), *aff'd sub nom.* ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975). *See also id.* at 147, 165-66, 260, 284-286.

of broadcast programming without the intended corresponding obligation to carry the locally-oriented free programming exhibited by local stations.[57] Absent must-carry rules, cable systems can effectively cut off the audience of some local television stations by carrying only those stations which they believe their subscribers will insist upon as a condition of maintaining their subscriptions, while refusing to carry those commercial and public television stations whose absence from the cable system will not drive subscribers to cancel their subscriptions. Absent review by this Court, the Commission's statutory mandate to determine the proper allocation of television broadcast signals in local communities nationwide thus will pass from the agency to cable operators acting as gatekeepers of all television programming entering cabled homes.

## CONCLUSION

INTV respectfully submits that this Court should grant a writ of certiorari to resolve the decisional conflicts and the important questions of federal constitutional and statutory law set forth herein.

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[57] The *Quincy* decision summarily rejected the notion that must-carry regulation was integrally related to cable's compulsory license to retransmit local station signals without compensation to the stations which must themselves negotiate and pay for their programming in the marketplace. Instead, the court found that the must-carry rules were merely "a convenient reference point [in the Copyright Act] for determining where a local signal ends and a distant signal begins." 768 F.2d at 1454 n.42. In light of the foregoing history, the court was clearly wrong.

Respectfully submitted,

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March 10, 1988

## APPENDIX

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent provisions of the Communications Act of 1934, as amended, are as follows:

> Sec. 1. [47 U.S.C. § 151] For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.
>
> Sec. 303(g) [47 U.S.C. § 303(g)] [The FCC shall have authority to] [s]tudy new uses for radio, provide for experimental uses of frequencies, and

generally encourage the larger and more effective use of radio in the public interest;

Sec. 303(h) [47 U.S.C. § 303(h)] [The FCC shall] [h]ave authority to establish areas or zones to be served by any station;

Sec. 303(s) [47 U.S.C. § 303(s)] [The FCC shall] [h]ave authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307(b) [47 U.S.C. § 307(b)] In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 111 of the Copyright Revision Act of 1976 (17 U.S.C. § 111) provides as follows:

(a) Certain Secondary Transmissions Exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by

the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) The secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) Secondary Transmission of Primary Transmission to Controlled Group.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary

transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided*, however, That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) Secondary Transmissions by Cable Systems.—

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible un-

der the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the

particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmissions: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary

transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) Compulsory License for Secondary Transmissions by Cable Systems.—

(1) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time

to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centrum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centrum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centrum of such gross receipts for each of the second,

third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centrum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centrum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic ser-

vice of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centrum of any gross receipts up to $80,000; and (ii) 1 per centrum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(2) The Register of copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by paragraph (1) of this subsection.

(3) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television

program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(a); and

(C) any such owner whose work was included in nonnetwork programing consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(4) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such

controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) Nonsimultaneous Secondary Transmissions by Cable Systems.—

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including The commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to clause (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within forty-five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to clause (2), to the erasure or destruction of all videotapes made or used during such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to clause (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations, and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the

transmission had been made simultaneously, except that this subclause shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, except that, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it, in accordance with clause (1), may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, to another cable system in any of those three territories, if—

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within thirty days after such contract is entered into, with the Copyright Office (which Office shall make each such contract available for public inspection); and

(B) the cable system to which the videotape is transferred complies with clause (1)(A), (B), (C)(i), (iii), and (iv), and (D) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with clause (1)(D) to each cable system mak-

ing a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or films, in which the reproduction is embodied.

(f) Definitions.—As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted. In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the "local service area of a primary transmitter" comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statis-

tical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 2 miles.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter" in the case of a television broadcast

station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. The "local service area of a primary transmitter", in the case of a radio broadcast station, comprises the primary service area of such station pursuant to the rules and regulations of the Federal Communications Commission.

A "distant signal equivalent" is the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programing so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission. The foregoing values for independent, network, and noncommercial educational stations are subject, however, to the following exceptions and limitations. Where the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also

permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, or where such rules and regulations in effect on the date of enactment of this Act permit a cable system, at its election, to effect such deletion and substitution of a non-live program or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional program; where the rules, regulations, or authorizations of the Federal Communications Commission in effect on the date of enactment of this Act permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year. In the case of a station carried pursuant to the late-night or specialty programing rules of the Federal Communications Commission, or a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth above, as

the case may be, shall be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programing supplied by such networks for a substantial part of that station's typical broadcast day.

An "independent station" is a commercial television broadcast station other than a network station.

A "noncommercial educational station" is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.

Section 624 of the Cable Communications Policy Act of 1984 [47 U.S.C. § 544] provides as follows:

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise—

(A) for facilities and equipment, and

(B) for broad categories of video programming or other services.

(c) Enforcement authority respecting franchises effective under prior law

In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) Cable service obscene, indecent or otherwise unprotected by Constitution

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2)(A) In order to restrict the viewing of programming which is obscene or indecent, upon

the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(B) Subparagraph (A) shall take effect 180 days after the effective date of this subchapter.

(e) Technical standards

The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to—

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this chapter; and

(B) any rule, regulation, or order under Title 17.

87-1510
87-1551

SUPREME COURT, U.S.
FILED
MAR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF
THE UNITED CHURCH OF CHRIST,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et. al.*,
*Respondents.*

NATIONAL ASSOCIATION OF BROADCASTERS,
*Petitioner*,

v.

CENTURY COMMUNICATIONS CORP., *et. al.*,
*Respondents.*

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
*Petitioner*,

v.

CENTURY COMMUNICATIONS CORPORATION, *et. al.*,
*Respondents.*

CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
AND PUBLIC BROADCASTING SERVICE,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et. al.*,

*Respondents.*

**On Petitions For Writs Of Certiorari**
**To The United States Court Of Appeals**
**For The District Of Columbia Circuit**

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 86-1683

CENTURY COMMUNICATIONS CORPORATION, et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

INDEPENDENT TELEVISION STATIONS, INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
UNIVISION, INC.,
THE NATIONAL ASSOCIATION OF BROADCASTERS,
LINCOLN BROADCASTING CO.,
NATIONAL CABLE TELEVISION ASSOCIATION, et al.,
OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION,
PUBLIC BROADCASTING SERVICE,
NATIONAL BROADCASTING CO., INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
INTERVENORS

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No. 87-1280

RICHARD S. LEGHORN, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

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No. 87-1301

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

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Petitions for Review of Orders of the Federal Communications Commission

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Argued October 22, 1987

Decided December 11, 1987

*John P. Cole, Jr.*, for joint petitioners, Century Communications Corp., et al. *David M. Silverman* also en-

tered an appearance for joint petitioners, Century Communications Corp., et al.

*David G. Rozzelle*, with whom *Marvin Rosenberg* and *Barry Lambergman* were on the brief for petitioner, Hubbard Broadcasting, Inc.

*James L. Quarles, III* was on the brief for petitioner, Richard S. Leghorn.

*Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, with whom *Diane S. Killroy*, General Counsel, *Gregory M. Christopher* and *C. Grey Pash*, Counsel, Federal Communications Commission were on the brief for respondent. *Robert B. Nicholson* and *Laura Heiser*, Attorneys, Department of Justice also entered appearances for respondent.

*Henry Geller*, with whom *Donna Lampert* and *Andrew Schwartzman* were on the brief for intervenor, United Church of Christ.

*Michael S. Horne*, with whom *J. Laurent Scharff*, *James M. Smith* and *Henry L. Baumann* were on the brief for intervenors, National Association of Broadcasters and Independent Television Stations, Inc. *Julian L. Shepard* and *Molly Pauker* also entered appearances for intervenor, National Association of Broadcasters.

*Arthur Pankopf*, *Susan Dillon*, *Baryn S. Futa*, *Martha M. Zornow*, *Paula A. Jameson* and *Nancy H. Hendry* were on the brief for intervenors, The Corporation for Public Broadcasting, et al.

*Norman P. Leventhal*, *Raul R. Rodriquez*, *Sally A. Buckman*, and *Richard F. Swift* were on the joint brief for intervenors, Spanish International Communications Corporation, National Independent Television Committee and Univision, Inc. *Judith Whittaker* was on the brief for intervenor, Spanish International Communications Corporation. *Richard E. Wiley* and *John C. Quale* also

entered appearances for intervenor, Spanish International Communications Corporation.

*Michael D. Berg* entered an appearance for intervenor, Lincoln Broadcasting Company.

*Jay E. Ricks* entered an appearance for intervenor, National Cable Television Association, Inc., et al.

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: Two years ago, in *Quincy Cable TV, Inc.* v. *Federal Communications Commission*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub. nom. National Association of Broadcasters* v. *Quincy Cable TV, Inc.*, 106 S. Ct. 2889 (1986), we struck down as violative of the first amendment the FCC's "must-carry" rules. Those rules required cable television operators, upon request and within the limits of their channel capacity, to transmit to their subscribers every over-the-air television broadcast signal that was "significantly viewed in the community" or otherwise considered "local" under the Commission's rules. *See Quincy Cable TV*, 768 F.2d at 1437. Today, we revisit this distinctive corner of first amendment jurisprudence, to evaluate the constitutional validity of the scaled-down must-carry rules adopted by the FCC following our decision in *Quincy Cable TV*. Although the FCC has eliminated the more extreme demands of its initial set of regulations, its arguments in this case leave us unconvinced that the new must-carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Accordingly, we invalidate as incompatible with the first amendment this latest incarnation of the FCC's must-carry rules.

## I. FACTS

Since the mid-1960's, when the nascent cable television industry began to loom as a threat to ordinary broadcast television, the Federal Communications Commission has labored to protect the local broadcast media through regulation of the cable industry. The Commission's objective in these endeavors

> was not merely to protect an established industry from the encroachment of an upstart young competitor, although such a result was clearly the byproduct of the regulatory posture that developed. Rather, the Commission took the position that without the power to regulate cable it could not discharge its statutory obligation to provide for "fair, efficient, and equitable" distribution of service among "the several States and communities." If permitted to grow unfettered, the Commission feared, cable might well supplant ordinary broadcast television. A necessary consequence of such displacement would be to undermine the FCC's mandate to allocate the broadcast spectrum in a manner that best served the public interest. In particular, if an unregulated, unlicensed cable industry were to threaten the economic viability of broadcast television, the Commission would be powerless to effect what it saw (and continues to see) as one of its cardinal objectives: the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'"

*Quincy Cable TV*, 768 F.2d at 1439 (citations and footnote omitted). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) (approving FCC regulation of cable as within the agency's authority so long as its actions are "reasonably ancillary" to its regulation of broadcast television); *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C. Rcd 864 (1986) (hereinafter "*Report and Order*"), *re-*

*consid. denied*, 2 F.C.C. Rcd 3593 (hereinafter, "*Recon. Order*"), at ¶¶ 1-29 (tracing history of cable regulation).[1]

Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable. The FCC first introduced such rules in 1962, when it sought to impose a must-carry requirement as a condition for granting an application to construct a microwave system to transmit distant signals to a rural cable system. *See Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 357 U.S. 951 (1963); *see also Quincy Cable TV*, 768 F.2d at 1440 n.11. In time, the FCC developed a broader must-carry regime, generally requiring cable operators, "upon request, to carry any broadcast signal considered local under the Commission's complex formula." *Quincy Cable TV*, 768 F.2d at 1440. The philosophy behind these rules was

> to assure that the advent of cable technology not undermine the financial viability of free, community-oriented television. If cable were to "drive out television broadcasting service . . . the public as a whole would lose far more—in free service, in service to outlying areas, and in local service to outlying areas, and in local service with local control and selection of programs—than it would gain." The must-carry

[1] Rather than retrace the ground covered in *Quincy Cable TV*, we refer the reader at this juncture to the detailed and comprehensive history of early cable regulation provided in Judge Wright's opinion in that case. *See* 768 F.2d at 1438-45. Other useful history appears in *Southwestern Cable Co., supra*, 392 U.S. at 161-67; United States v. Midwest Video Corp., 406 U.S. 649 (1972) (holding that rule requiring cable operators to originate local programming fell within FCC's statutory jurisdiction); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (striking down as beyond the FCC's jurisdiction rules requiring cable operators to make channels available for local access); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (holding state regulation of alcoholic beverage advertising on cable television systems to be preempted by Communications Act of 1934).

> rules, together with a comprehensive body of related regulations, would channel the development of the nascent cable industry to limit the risks it might pose to conventional broadcasting, "society's chosen instrument for the provisions of video services."

*Id.* (citations omitted); *see generally id.* at 1440-43 (describing, in considerably greater detail, the rationale for the pre-*Quincy Cable TV* must-carry rules).

In 1985, this circuit faced for the first time the question whether the broad must-carry rules which had been in existence for nearly two decades were in harmony with the first amendment. Judge Wright's opinion for a unanimous panel in *Quincy Cable TV* held that they were not. As a threshold matter, we observed that our first amendment review of regulations burdening cable television was not governed by those cases, such as *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) and *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), upholding regulations on broadcast television. In reaching that conclusion, we noted "the Supreme Court's oft-repeated suggestion that the First Amendment tolerates far more intrusive regulation of broadcasters than of other media precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum." 768 F.2d at 1448. Wire-carried media like cable, of course, have no such limitations, and thus we found the "scarcity rationale" that the Supreme Court has used to justify broadcast television regulations to offer no succor to those seeking to establish the constitutional validity of cable television regulations. *Id.* at 1448-50.

*Quincy Cable TV* did not, however, establish the precise degree of first amendment protection enjoyed by cable operators. Although our opinion noted that some

parallels existed between the must-carry regulations and regulations impinging on editorial discretion that had been invalidated in the past, *see Quincy Cable TV*, 768 F.2d at 1452 (citing *Miami Herald Co.* v. *Tornillo*, 418 U.S. 241 (1974)), it pointedly declined to "definitively decide" whether cable operators enjoy the heightened protection accruing to newspapers or whether the must-carry regulations were more appropriately evaluated under the test, set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See Quincy Cable TV*, 768 F.2d at 1454. Rather, we concluded that the must-carry rules would fail even the *O'Brien* test's requirement of a substantial governmental interest furthered by means no greater than are essential to the furtherance of that interest.

The reasons for our invalidation of the 1985 must-carry rules under the *O'Brien* test were twofold. First, we concluded that the Commission had not adequately substantiated its assertion that a substantial governmental interest existed. In *Quincy Cable TV* we stated that, even accepting the view that the preservation of free local television was an important regulatory goal, our review of the FCC's reports and regulations suggested that the problem the sweeping must-carry rules purported to prevent—the destruction of free, local television—was merely a "fanciful threat," unsubstantiated by the record or by two decades of experience with cable TV. *Id.* at 1457. In general, we noted, "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Id.* at 1454. Second, even if the interest had been deemed substantial, the broadly-drafted must-carry rules represented a fatally overinclusive response to the problem. We observed in this vein that the rules indiscriminately protected every local broadcaster, regardless of whether it was in fact threatened, and regardless of the quantity of local service available in the community and the degree to which the cable operator in question already carried local outlets.

*Id.* at 1459-62. We did, however, note that our decision in no way foreclosed the Commission from adopting new must-carry rules consonant with the *O'Brien* test. *Id.* at 1463.

In the aftermath of *Quincy Cable TV*, the FCC immediately suspended enforcement of the must-carry rules. Four months later, it announced its intention to undertake rulemaking proceedings, *see Notice of Inquiry and Notice of Proposed Rulemaking*, 50 Fed. Reg. 48232 (1985), and eventually, in November 1986, 16 months after *Quincy Cable TV* had been handed down, the agency released a new, more limited set of must-carry rules designed to accommodate *Quincy Cable TV's* concerns. *See Report & Order.* In the decision to promulgate these new rules, the Commission took note of the many comments, submitted primarily but not exclusively by broadcasting interests, arguing that some form of FCC intervention remained necessary to protect local broadcasting. *See Report & Order* at ¶¶ 36-51; *see also id.* at ¶¶ 52-57 (describing comments, primarily from cable operators, arguing that the reinstitution of must-carry was unnecessary and undesirable).

The most salient feature of the new rules was that the Commission substantially altered its stated justification for imposing must-carry rules at all. No longer did the Commission argue, as it had prior to the *Quincy Cable TV* decision, that the rules were needed for the indefinite future to ensure viewer access to local broadcast stations. Rather, the Commission now argued that must-carry rules were needed to guarantee such access during a shorter-term transition period during which viewers could become accustomed to an existing and inexpensive but largely unknown piece of equipment known as the "input-selector device."

Such devices, if hooked up to a television, allow viewers at any given time to select, simply by flicking a switch, between shows offered by their cable system and broad-

cast television shows offered off-the-air. These devices, the most common of which is known in the cable industry as an "A/B switch," are about the size of a standard light-switch, and work by being hooked up to a roof-top, attic or television-top antenna. According to a study cited by the Commission in its report explaining the new must-carry rules, the cost of buying such a switch is approximately $7.50, and the cost of buying an outdoor antenna to go with it is approximately $50. *See* Joint Appendix ("J.A.") at 240-42 (cited at *Report & Order* at ¶ 124). Outdoor antennas are generally the more expensive of the three types of antennas.

The Commission estimated that it would take approximately five years for the public to become acclimated to the existence of these switches, and accordingly, its interim rules should be in place for that same five years. *See* 47 C.F.R. § 76.64 (stating that rules remain in force until January 15, 1992); *see also Report & Order* at ¶ 138. At that point, the need for ongoing must-carry rules to ensure viewer access to local broadcast stations would be obviated. *See Report & Order* at ¶ 163 ("once cable subscribers become accustomed to using off-the-air reception on an equal basis with cable service, then cable systems no longer will have an artificial ability to limit their subscribers' access to over-the-air broadcast signals"); *see also id.* at ¶ 138 ("While we have found that short-term must carry regulations are necessary in order to ensure that broadcasting remains a competitive alternative source of programming in the interim period, the record clearly supports no more extensive regulatory program than that which we are adopting").

Because the Commission envisioned these switches as guaranteeing effective viewer choice between local and cable shows, it ultimately added to the new must-carry regime the requirement that cable systems offer subscribers, for pay, input-selector devices that could be hooked up to their TVs. *See* 47 C.F.R. § 76.66; *see also*

*Report & Order* at ¶ 140; *Recon. Order* at ¶¶ 80-94 (sketching input-selector requirements and amending earlier regulations so as not to require cable operators to install such devices for free or at cost). It did so over the reservations of some broadcasting concerns, who viewed the input-selector devices as less protective than must-carry rules. *See Report & Order* at ¶¶ 45-47 (noting that "broadcasting interests" did not regard the A/B switch as an efficacious way of protecting local broadcasting). The Commission, observing that relatively few consumers knew about the switch-and-antenna mechanism and noting that the long history of must-carry rules had created a public "misperception" that "broadcast signals will always be available as part of their basic cable service," *see Report & Order* at ¶¶ 121-22, also promised to require cable operators to educate the viewing public about the availability of the switch-and-antenna mechanism. *See, e.g., Report & Order* at ¶¶ 1, 136.

In addition to thus offering a new and more limited justification for must-carry rules, the Commission also substantially limited the sweep of the new rules in a number of respects. It set forth limits on how many channels a cable carrier must devote to must-carry: carriers with 20 channels or less were not required to carry any must-carry stations; carriers with between 21 and 26 stations could be required to carry up to 7 channels of must-carry signals; and carriers with 27 or more channels could be required to devote up to 25% of their system to must-carry signals. *See* 47 C.F.R. § 76.56; *see also Report & Order* at ¶¶ 150-52. It also limited the pool of potential must-carry channels to those satisfying a "viewing standard" generally demonstrating a minimum viewership of the channel in question. *See* 47 C.F.R. § 76.5(d)1(ii); 47 C.F.R. § 76.55 (stating that a broadcast station qualifies for inclusion in must-carry pool if it demonstrates that it attains at least an average share of total viewing hours of at least 2 percent and a net

weekly circulation of 5 percent in noncable households in the county where the cable system is located); *see also Report & Order* at ¶¶ 145-46. The Commission also authorized cable operators to refuse to carry more than one station affiliated with the same commercial network. *See Report & Order* at ¶ 153. Finally, the Commission limited the number of noncommercial stations required to be carried, stating that when the cable system had fewer than 54 channels and an eligible noncommercial station or translater existed, the cable operator must devote at least one channel to a noncommercial station; and that when the cable system had 54 or more stations, it must devote two must-carry channels to such endeavors. *See* 47 C.F.R. § 76.56.

Constitutional and statutory challenges to these new must-carry rules were lodged shortly after their promulgation by an array of cable operators and public interest group. Petitioner Century Comumnications Corp., joined by 13 other cable operators (hereinafter "Joint Petitioners"), protests the must-carry rules as violative of the first amendment of the Constitution, as a taking of property without just compensation in violation of the fifth amendment, and as a measure not authorized by the FCC's statutory jurisdiction and hence *ultra vires*. Petitioner Richard Leghorn, a former cable system operator and presently an investor in the cable industry, challenges the rules on first amendment grounds. Petitioner Hubbard Broadcasting, Inc., a broadcasting concern, assails the failure of the new rules to afford must-carry rights to commercial broadcast translator stations as arbitrary and capricious and therefore violative of the Administrative Procedure Act ("APA"). Intervenor Association of Independent Television Stations argues that the must-carry rules are inconsistent with the Commission's statutory charter to protect adequately needy local stations. Intervenor the United Church of Christ challenges the regulations as arbitrary and capricious in a number of respects. Three other intervenors, the Na-

tional Independent Television Committee, Spanish International Communications Corp., and Univision, Inc., target the viewing standard provision of the new must-carry rules as a content-based regulation giving preference to "popular" over "unpopular" speech and therefore violative of the first amendment; these groups also contend that this requirement is an arbitrary and capricious measure adopted in violation of the APA.

The FCC, in response, defends the must-carry rules as based on a satisfactory administrative record and as consonant with the first and fifth amendments. In this endeavor it is joined by five intervenors. The Corporation for Public Broadcasting, the National Association of Public Television Stations, and the Public Broadcasting Service defend the FCC initiative as consistent with both the first amendment and the APA. Two other intervenors, the National Association of Broadcasters and the Association of Independent Television Systems, Inc., similarly defend the regulations against constitutional and statutory attack.

We, however, need look no further than petitioners' first amendment claims to decide this case. Because we invalidate the entire new must-carry regime as unjustified and as unduly sweeping, we do not reach—and therefore express no opinion on—the subsidiary first amendment challenges to particular facets of the rules, or the arguments based on the APA that the rules are too narrow in scope.

## II. Opinion

### A. *The Appropriate Level of First Amendment Scrutiny*

A threshold question for our first amendment analysis is what standard of review to apply. As in *Quincy Cable TV*, the parties dwell heavily on this issue, offering clever and flavorful analogies to other corners of first amendment law on which more light has been shed.

Petitioners characterize the must-carry rules as posing more than an incidental burden on speech, likening the rules to the newspaper right-of-reply statute invalidated in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), where the Supreme Court held that the enactment impermissibly interfered with the newspaper's constitutionally protected "editorial discretion." Toward this end, petitioners also offer the recent case of *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986), where the Court noted that the selection and organization of programs on cable television does involve some degree of editorial discretion. *Id.* at 2037.[2] *See* Brief for Joint Petitioners at 10-21.

The FCC counters by characterizing the must-carry rules as a commercial regulation that burdens speech in a far more attenuated fashion. Accordingly, the FCC argues, the must-carry rules are more appropriately analyzed under the standards set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), where the Supreme Court stated that to be valid, a regulation incidentally burdening speech and not aimed at the suppression of free expression must advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end. *O'Brien*, 391 U.S. at 377. *See* Brief for FCC at 30-42.

The precise level of first amendment protection due a cable television operator is clearly an issue of much moment to the industry and ultimately to viewers. However, having closely analyzed the rationale for and workings of the new must-carry rules, we conclude that we

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[2] *Preferred Communications* did not involve restrictions on the contours of a particular cable operator's offerings, as in *Quincy Cable TV* and the present case, but rather the issue of whether municipal restrictions on cable television franchising implicated first amendment interests. The Supreme Court held that they did, and accordingly remanded for a fuller development of the factual issues in the case.

again need not resolve this vexing question. Like the original must-carry regime invalidated in *Quincy Cable TV*, the new, scaled-back edition fails to satisfy even the less-demanding first amendment test of *United States* v. *O'Brien* whose use here is advocated by the FCC. *See, e.g.*, Brief for FCC at 30 (describing *O'Brien* as "the correct test").[3] We now proceed to offer our application of that test.

B. *An* O'Brien-*Test Analysis of the New Regulations*

In *United States* v. *O'Brien*, the Supreme Court stated:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. Typically, analysis under *United States* v. *O'Brien* begins with an appraisal of whether the interest said to be served by a governmental measure is substantial. If it is, we proceed to the more delicate fact-bound issue of whether the means chosen are congruent with the desired end, or whether they are too broadly tailored to pass muster. *See O'Brien*, 391 U.S.

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[3] In addition to claiming enhanced first amendment protection on *Tornillo* grounds, petitioners also contend that the must-carry rules constitute content-discrimination requiring more substantial governmental justification. *See, e.g.*, Brief for Joint Petitioners at 4-5, 13-21 (stating that the rules favor the speech of certain popular local broadcast licensees with various characteristics). The FCC denies this characterization. *See, e.g.*, Brief for FCC at 32-36. Because we conclude that these rules are invalid even under the *O'Brien* test, we need not resolve this additional claim for stronger first amendment protection.

at 377; *see also Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984) (applying *O'Brien* test to uphold city ordinance prohibiting posting of signs on public property); *Quincy Cable TV*, 768 F.2d at 1454-62 (using the two-step *O'Brien* framework employed here).

In this endeavor we are mindful of the fact that it is a first amendment test we are applying. Although at times an *O'Brien* inquiry into an agency regulation may appear to resemble an exercise in administrative law analysis, the Supreme Court has often noted that the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake. *See, e.g., Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. at 803 n.22 (courts "may not simply assume that [an] ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity"); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (holding that no governmental justification existed to support application of a zoning ordinance to bar nude dancing); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part and dissenting in part) ("As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives.").

We stress at the outset that both the justification offered by the FCC for its new regulations and the scope of those new initiatives differ rather markedly from the justification for and scope of the initial must-carry rules struck down in *Quincy Cable TV*.[4] We therefore do not

[4] The FCC's primary justification for the new must-carry rules, as noted previously, is no longer that they are per-

by any means accept petitioners' characterization, *see* Brief for Joint Petitioners at 1, of the new must-carry rules as mere imitations of those invalidated in *Quincy Cable TV* and thus deserving of a hasty execution. Although *Quincy Cable TV* supplies the structural framework for our analysis, the new must-carry rules are to be evaluated on their own terms: they should not suffer

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manently needed to safeguard the diverse programming generated by protecting local broadcasts. That argument was foreclosed by *Quincy Cable TV*, and the FCC now concedes as well that the spread of A/B switches and antennas to households will ultimately ensure such diversity. *See Report & Order* at ¶ 119 (noting that agency has conceded inadequacy of earlier rationale for must-carry rules). Rather, the FCC makes a more limited argument on behalf of its new rules: that they are needed as an interim measure, to tide the broadcast industry and viewers through the period, estimated by the FCC as five years, during which the American public is introduced to such new technology. *Compare Report & Order* at ¶ 119 (noting that justification for original must-carry rules was to "protect[] one segment of the television industry by substantially limiting the ability of others to offer service to consumers") *with Report & Order* at ¶ 1 ("[t]he new regulatory program is designed to maximize consumers' program choices by developing cable subscribers' awareness of the need for the capability to receive off-the-air broadcast signals independent of their cable service") *and with Recon. Order* at ¶ 47 ("our objective [now is] ensuring viewer access to the maximum number of program choices available through cable and off-the-air broadcast television facilities").

Similarly, the scope of the new must-carry rules is far less sweeping than the regulations we branded as overinclusive in *Quincy Cable TV*. The must-carry rules at issue here require cable operators to set aside no more than one-third of their channels—a far cry from the previous rules, under which must-carry stations could in theory have dominated a cable operator's roster of channels. Additionally, the viewing standard requirement, other first amendment objections aside, does mitigate the possibility of a cable operator being saddled with unpopular and hence unprofitable channels. Finally, the five-year span of the rules necessarily softens their cumulative impact.

by dint of their association with the previous must-carry regime.

Our reservations about the new must-carry rules do, however, implicate both the substantiality of the governmental interest advanced and the narrowness of their design.

1. *The Substantiality of the Governmental Interest*

It may well be that upon a suitable record showing, the justification offered by the FCC, that interim regulations are needed to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold, would satisfy the *O'Brien* standard. *See, e.g., FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (deeming "the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the [Commission's] public interest standard and the First Amendment"); *cf. FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (noting first amendment value of achieving "'widest possible dissemination of information from diverse and antagonistic sources'") (citations omitted). The difficulty is that here, as in *Quincy Cable TV*, the FCC's judgment that transitional rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions of the FCC, from which we conclude that the need for a new saga of must-carry rules is more speculative than real. *See, e.g., Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (requiring agencies to present "a record that convincingly shows a problem to exist" in order to satisfy the "substantial interest" prong of the *O'Brien* test); *see also Quincy Cable TV*, 768 F.2d at 1455 n.44 (noting Supreme Court cases requiring "more than an unsubstantiated assertion of the importance of the governmental interest"). Such speculative

fears alone have never been held sufficient to justify trenching on first amendment liberties.

The agency's first questionable contention is that consumers are not now aware and cannot be expected to become aware in fewer than five years that the installation of an A/B switch could preserve their choice of programs:

> "[T]he perception [exists] that cable systems may be able to preclude access by their subscribers to off-the-air broadcast signals. This perception derives not from any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their basic cable service. This expectation is a direct result of the former must-carry rules, which, in fact, required cable systems to carry all available off-the-air broadcast television signals. The expectation that local broadcast signals will be carried by their cable system has caused many subscribers to perceive that there is no need to install or maintain the capability to receive broadcast signals off-the-air.
>
> . . .
>
> "If we did not adopt interim must-carry rules now, until our long-term regulatory plan to educate consumers on the need for independent access to off-the-air signals and to make input selector switches available takes hold, harm to the public interest would ensue.

*See Report & Order* at ¶¶ 121, 126.

The FCC, however, adduces scant evidence for its judgment of a widespread "misperception" among cable subscribers that the only means of access to off-the-air signals is through cable service. It puts forth no attitudinal surveys, or polls, suggesting the likely pace of consumer adaptation to the A/B switch technology. Nor does it offer analogies illustrating how swiftly consumers have incorporated previous electronic innovations. Such evidence might have shown what the FCC simply assumes

here: that upon the disappearance of must-carry regulations, consumers would collectively fail to install with any dispatch the switches and antennas necessary to gain access to local broadcast stations, conceivably imperiling the survival of these stations and thereby depriving viewers of diverse broadcasting offerings.

The lone item of "hard" record evidence on which the FCC relies in support of its need for a five-year interim must-carry period is a study entitled, "Outdoor Antennas, Reception of Local Television Signals and Cable Television," prepared by the ELRA Group, Inc., for the National Association of Broadcasters ("NAB"), *see* J.A. at 205 (cited at *Report & Order* at ¶ 124). NAB's members have long benefited from the existence of must-carry rules, and the organization, during rulemaking, strongly criticized alternative proposed regulations that it perceived as inadequately protective of broadcasters, such as reliance on the A/B switch. *See Report & Order* at ¶ 47 (summarizing NAB's statement to FCC).

This NAB study is essentially a statistical compilation of survey results gleaned from a poll of 610 heads of cable households. The FCC cites this survey generally without pinpointing any specific parts of it that would strongly support the new must-carry regime, *see Report and Order* at ¶ 124. We probe its findings in greater detail here, seeking to uncover and evaluate the particular material in it that may reinforce the agency's rationale.

Among its melange of disparate facts and findings, the study includes four items of information that arguably could be said to point to a need for interim must-carry rules: (1) only about 1% of cable subscribers presently have both the outdoor antenna and A/B switch needed to gain access to noncarried local programming in the absence of must-carry rules; (2) many cable viewers originally owning antennas have taken them down, because they were unsightly, and only about 10% of cable

subscribers presently switch back and forth between cable and antennas; (3) a third of cable homes have video cassette recorders and thus may face some increased difficulty attaching the A B switch; and finally, (4) about half of cable subscribers doubted that if local broadcast stations were dropped from cable they would buy what the survey termed a "special switch" enabling them to go back and forth between cable and their antennas. Primarily on the basis of these findings, and particularly the finding that relatively few homes are presently equipped with both antennas and switches, the report concludes that the transition to a world without must-carry could force consumers as a whole to expend millions of dollars. It does not, however, suggest that the new technology would be especially costly to consumers on an *individual* basis. Nor does it estimate how long it would take for most households to acquire and install the required switch and antenna.

Even accepting the NAB's findings as accurate, it requires an inferential leap of some distance to arrive at a need for five more years of must-carry. Only through the rosiest of broadcasters' lenses can the NAB study's first salient finding—that there is a dearth of antenna-and-switch setups in American households—be seen as pointing to the difficulty of installing such gear or to the inability of consumers to learn of their availability. More likely, the absence of such equipment from most homes reflects the obvious reality that, so long as the government requires cable companies to offer local broadcasting through the must-carry regime, such supplemental equipment is unnecessary. The FCC's own determination that the consumer misperception upon which it so heavily relies "is a direct result of the former must carry rules," *see Report & Order* at ¶ 121, seriously undercuts the NAB's implication that the unavailability of switch-and-antenna gear is an endemic or long-term problem.

The NAB study's second finding, that few of those with switch-and-antenna capability currently switch back and forth between cable and broadcast with any regularity, can most reasonably be accounted for by the fact that, in a must-carry world, the need to do so is slight. Like the fact that few households have installed switches and antennas, this finding merely describes present reality without offering any glimpse into how the change of one key variable—the lapse of must-carry regulations—would affect that reality. As petitioner Leghorn, who appeared before the FCC during rulemaking proceedings, observes, *see* Brief for Petitioner Leghorn at 12: "Common sense suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations."

The NAB study's third potentially relevant finding, that many cable subscribers own VCRs and thus would face somewhat complicated problems hooking up the switch-and-antenna, is readily dismissed as a grounds on which to justify the need for new must-carry regulations: the FCC itself, in its report explicating the new regulations, specifically discounts reliance on the VCR-interference theory. The Commission concluded:

> We believe that any equipment compatibility problems can be overcome through relatively minor modifications to switching devices and that cable operators and other equipment suppliers can provide the information and/or assistance consumers need to install the switches for use with VCRs.

*See Report & Order* at ¶ 167 (observing as well that "many of these concerns may become moot if television receivers begin to be manufactured with switching or interface devices built in"); *see also Recon. Order* at ¶ 51 (noting that "[e]vidence that subscribers can make complex cable connections correctly is provided by the fact

that there have been no widespread problems or difficulties encountered by consumers in installation of cable-ready VCRs and receivers . . . many cable subscribers now are acquiring and successfully installing their own cable terminal/converter equipment").

The NAB study's final pertinent observation is that about half of the survey's respondents are unwilling to predict that they would ultimately purchase what the survey question termed a "special switch." Initially, we note that this characterization obscures somewhat the low price and easy installation of the A/B switch. Survey imperfections aside, however, this finding seems to us unpersuasive, for it almost certainly reflects merely the present consumer unfamiliarity with the switch and antenna mechanism. To the extent it does not, it may also reflect consumer disinterest in having access to off-the-air signals. Either way, this finding hardly explains why the five-year transitional period chosen by the FCC is necessary. The NAB's study thus provides only the spongiest of foundations for the FCC's asserted justification for its regulations.

In appraising the FCC's argument that the indelibility of consumer ignorance justifies the reimposition of must-carry rules, we are thus left to ask whether the FCC's contention is so obvious or commonsensical that it needs no empirical support to stand up. We conclude that it is not. For one thing, the FCC's own report elsewhere belies the agency's fears of viewer lethargy. The Commission notes:

> There is evidence that video consumers are now becoming accustomed to switching between alternate program input sources. We observe that many cable systems now offer services through dual cables in order to provide greater channel capacity. Such systems employ switching devices to select between the two cables and often mark the switch positions with "A" and "B" designations. *Cable subscribers*

> *apparently have accepted this switching arrangement and do not find it inconvenient.*

*See Report & Order* at ¶ 164 (emphasis added).

More generally, we simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes. In a culture in which even costly items like the video-cassette recorder, the cordless telephone, the compact disc-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.[5]

Even were we to accept, however, the Commission's view that consumer ignorance cannot be readily eradi-

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[5] The Commission's report on the new must-carry regulations also rules out several alternative conceivable justifications for the new regulations raised by broadcasting interests during rulemaking. Contrary to broadcasters' assertions, the FCC specifically found concerns about the adequacy of input selector switches to be "overstated" and discounted reliance on this argument as a basis for its regulations. *See Report & Order* at ¶ 165. Likewise, the Commission dismisses the argument that indoor antennas are difficult or expensive to install. *See Report & Order* at ¶ 166 ("[t]he relatively low cost and simple installation of indoor antennas can be expected to make it easy for cable subscribers to acquire the capability to receive broadcast stations not carried on cable"); *see also Quincy Cable TV*, 768 F.2d at 1457 n.48 (noting that Commission had conceded that switching devices do not pose a significant barrier to receiving off-the-air signals). Finally, the Commission notes, "[t]he argument that outdoor antennas are sometimes prohibited ignores the fact that in many of these situations it is possible to receive signals of acceptable quality using an inexpensive indoor, set-top antenna. . . . Attic antennas which can give additional off-the-air reception capability are also available." *Report & Order* at ¶ 166.

cated, we have a second fundamental problem with the Commission's judgment that its interim must-carry rules are needed to advance a substantial governmental interest sufficient to support burdening cable operators' first amendment rights. The Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts. Experience belies that assertion. As cable operators reported to the Commission during rulemaking proceedings, *see Report & Order* at ¶ 53, during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*.

The FCC responds that this constitutes "only limited direct evidence," and that in any event some cable companies did drop individual broadcast stations, *see Report & Order* at ¶ 131. One might also speculate on behalf of the FCC that the inaction of cable companies after *Quincy Cable TV* may have partially resulted from their expectation that some new must-carry rules would inevitably emerge. Nevertheless, given *Quincy Cable TV's* vigorous denunciation of the breadth of the old must-carry rules, one can hardly assume that cable companies expected the FCC to reintroduce anything like the old sweeping must-carry requirements. Also undercutting the FCC's fearful assumption is the fact that both the Federal Trade Commission and the Department of Justice have concluded, in separate reports, that the absence of must-carry would not harm local broadcasting. *See Report & Order* at ¶ 54 (noting Federal Trade Commission study, submitted in FCC rulemaking, that an analysis of 24 satellite television stations showed that "absent must-carry rules, cable systems can be expected to carry many or most local broadcast stations"); *id.* at ¶ 55 (noting that Department of Justice also concludes that must-carry rules are not needed to foster localism); *id.*

at ¶ 114 (FCC acknowledges during post-*Quincy Cable TV* hiatus that "many cable systems are now providing locally originated programming services").

For these reasons, we conclude that the FCC has not demonstrated that the new must-carry rules further a substantial governmental interest, as the rules must to outweigh the incidental burden on first amendment interests conceded by all parties here. As we stated in *Quincy Cable TV*, "[a]t least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured." 768 F.2d at 1455. The FCC error in this case was its failure to go that extra step here.

2. *The Congruence Between Means and Ends*

The second prong of the *O'Brien* test focuses on the congruence between the means chosen by the agency and the end it seeks to achieve. In this case, even were we convinced that the interest in whose name the FCC purports to act was more than a "fanciful threat," *see Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the new must-carry regulations, because of their lengthy duration, are too broad to pass muster even under the *O'Brien* test.

If any interim period of must-carry rules is, in fact, necessary, the FCC adduces literally no evidence that this period must last for fully five years. Such a period is strikingly long in an industry that the FCC itself characterizes as "rapidly evolving." *See Report & Order* at ¶ 133. In the absence of any empirical support for the new must-carry rules, the FCC falls back on what it terms a "sound predictive judgment," *see Recon. Order* at ¶ 62, that it will take about five years for consumers

to learn about the switch-and-antenna mechanism, and thus that a five-year transition period is needed during which the agency will provide consumer education.

We are, however, unpersuaded. In large part our reluctance to countenance reimposing must-carry rules for five years based on a "sound predictive judgment" that is never explained reflects our perceptions about consumer aptitude stated earlier. Such a guess about consumer instincts hardly presents the sort of issue where, "if complete factual support . . . for the Commission's judgment or prediction is not possible," we should defer to the Commission's expert judgment. *See FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. at 814. It is wholly unclear to us why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels. The FCC report does nothing to shed light on this matter.

Additionally, we are skeptical—and the FCC's report says nothing to relieve this skepticism—that any consumer education campaign will have much impact so long as viewers can continue to rely on must-carry to get their fix of local broadcasts. It is entirely likely that not until the waning few months of the five-year must-carry regime would the FCC's admonitions about the need for switches and antennas begin to sink in, much as the existence of switches and antennas has largely gone unnoticed in a consumer population already accessed to local television as a result of must-carry in recent years. Opting for a five-year interim period therefore merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase, and install the requisite equipment.[6] We therefore find it diffi-

[6] In addition to our concerns about the unnecessary duration of these "interim" rules, we are unconvinced, based on our reading of the agency record, that the Commission was correct to dismiss peremptorily the less restrictive alterna-

cult to defer blindly to the Commission's unproven belief that half a decade is necessary.

## III. Conclusion

Our decision today is a narrow one. We hold simply that, in the absence of record evidence in support of its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the *O'Brien* test for incidental restrictions on speech. We do not suggest that must-carry rules are *per se* unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests. But when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures. As in *Quincy Cable TV*, we reluctantly conclude that the FCC has not done so in this case, but instead has failed to " 'put itself in a position to know' " whether the problem that its regulations seek to solve " 'is a real or fanciful threat.' " *Quincy Cable TV*, 768 F.2d at 1457-59 (quoting *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)). Accordingly, we have no choice but to strike down this latest embodiment of must-carry.

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tives to must-carry rules proposed during rulemaking and during the Commission's reconsideration of the new rules by petitioners and intervenors, and particularly by petitioner Richard Leghorn. *See Report & Order* at ¶¶ 174-75 (rejecting Leghorn proposal that would, among other things, require that all new televisions be built with switches); *see also Recon. Order* at ¶ 56 (same). Nevertheless, because we invalidate the new must-carry rules on the grounds already stated, we do not decide this issue and do not base our decision on any judgment as to the relative desirability of these alternative proposals.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 86-1683

CENTURY COMMUNICATIONS CORPORATION, et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
UNIVISION, INC.,
THE NATIONAL ASSOCIATION OF BROADCASTERS,
LINCOLN BROADCASTING CO.,
NATIONAL CABLE TELEVISION ASSOCIATION, et al.,
OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION,
PUBLIC BROADCASTING SERVICE,
NATIONAL BROADCASTING CO., INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
INTERVENORS

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No. 87-1280

RICHARD S. LEGHORN, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

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No. 87-1301

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

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Petitions for Review of Orders of the Federal Communications Commission

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On Motion For Clarification of Opinion Issued December 11, 1987

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Filed January 29, 1988

Before: WALD, *Chief Judge*, and MIKVA, *Circuit Judge*.

ORDER

Upon consideration of Respondent Federal Communications Commission's motion for clarification of the Court's

opinion of December 11, 1987, and of Petitioner Century Communications Corporation's opposition thereto, the motion is granted.

The Court's opinion in *Century Communications Corp.* v. *Federal Communications Commission*, No. 86-1683, slip op. (D.C. Cir. Dec. 11, 1987) is hereby clarified as follows:

(1) The Court has invalidated the interim "must carry" rules of the Federal Communications Commission that became effective on June 10, 1987. Those rules required cable systems to carry certain broadcast signals. *See* 47 C.F.R. § 76.56 (mandatory carriage of television stations); § 76.58 (disputes concerning carriage); § 76.60 (carriage of other television signals); § 76.62 (manner of carriage); *see also* 47 C.F.R. § 76.5 (as amended August 7, 1986 and/or March 26, 1987); § 76.53 (same); § 76.55 (same); § 76.64 (same).

(2) The Court has not struck down the requirements concerning input selector switches and consumer education due to take effect February 29, 1988. *See, e.g.*, § 76.66 (input selector switches and consumer education). Those separate requirements were not included in petitioners' first amendment and statutory challenge to the must-carry regulations, which impermissibly infringed on the first amendment rights of cable operators. Nor are the input selector and consumer education requirements so inextricably bound up with the must-carry requirements as to constitute an inseparable package. Rather, they are independent measures designed toward the same end as the invalidated must-carry rules: easing a transition to a world without must-carry channels.

(3) Insofar as portions of the rules regarding consumer education and input selector switches do make references to the now-invalidated must-carry provisions, we instruct the Commission on remand to make appropriate adjustments in light of the invalidation of the interim must-carry rules.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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## MM Docket No. 85-349[1]

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In the Matter of

Amendment of Part 76 of the
Commission's Rules Concerning
Carriage of Television Broadcast
Signals by Cable Television Systems

**REPORT AND ORDER**
**Proceeding Terminated**

**Adopted: August 7, 1986;** **Released: November 28, 1986**

By the Commission: Commissioners Quello and Dawson issuing separate statements.

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[1] The issues left open in Docket Nos. 21323, 81-741, and 84-168 relating to cable carriage of multi-channel television sound, program-related teletext, and program-related communications on the vertical blanking interval also will be addressed herein. *See Memorandum Opinion and Order* in Docket Nos. 21323, 81-741, and 84-168, adopted February 8, 1985, 50 FR 11000.

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## INTRODUCTION

1. By this action, the Commission is adopting a two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation. The previous "must carry" rules were held constitutionally invalid by the United States Court of Appeals for the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC (Quincy).*[2] The first part of the new regulatory program will require cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning the purpose of, and need for, maintaining off-the-air reception capability.[3] The second part of this plan consists of interim must carry rules that are intended to provide an orderly transition to a new environment. Thus, the new must carry rules will expire at the end of a five year transition period. These interim must carry rules are a modified version of the proposed industry agreement that was filed jointly by several of the major broadcast and cable trade associations.[4] The modifications to the industry agreement include specific protections for noncommercial educational and new commercial broadcast stations. The new regulatory program is designed to maximize consumers' program choices

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[2] 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502).

[3] An input selector switch is any device that enables the viewer to select between cable service and off-the-air reception of broadcast signals. Although such devices are often referred to as "A/B" switches, they may, in fact, be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

[4] The parties endorsing this agreement are the National Association of Broadcasters (NAB), The Association of Independent Television Stations (INTV), the Television Operations Caucus (TOC), the National Cable Television Association (NCTA), and the Community Antenna Television Association (CATA).

by developing cable subscribers' awareness of the need for the capability to receive off-the-air broadcast signals independent of their cable service. We believe that this program provides a constitutionally acceptable balance between the need to protect this federal and the First Amendment rights of cable operators.

## BACKGROUND

2. The Commission's former must carry requirements for cable television systems are set forth in Sections 76.57-76.61 of its rules.[5] Under these rules, a cable system was required, upon request and within the limits of its channel capacity, to carry the signals of all local broadcast television stations. In general, a station is considered local if the station or its market encompasses, or is in close proximity to, the cable system's community, or if the station's signal otherwise is "significantly viewed" by off-the-air viewers in the cable system's community. The specific provisions of the must carry rules vary depending on the size of the market in which the cable system is located.[6] In accordance with the *Quincy* decision, the Commission suspended enforcement of the must carry rules, effective July 19, 1985.[7]

3. *Development of the Rules.* Broadcast television stations and cable television systems provide services and operate in manners that in some respects are complementary and in others highly competitive. Broadcast television stations offer advertiser-supported or public-supported "free" over-the-air service to their local communities. In

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[5] *See* 47 CFR §§76.57-76.61.

[6] There are separate versions of the must carry rules for cable systems operating: 1) outside all television markets: 2) in smaller television markets; and 3) in major television markets. *See* 47 CFR §§76.57, 76.59, and 76.61.

[7] *See* "Suspended Enforcement of Certain Sections of 47 CFR Part 76," Public Notice, released September 10, 1985, 50 FR 38003.

contrast, cable systems offer multiple video services to fee-paying subscribers through the facilities of a coaxial cable. In addition to local television stations, cable systems may carry program services from other sources such as distant television stations, special satellite-delivered cable networks and premium services and local origination channels.

4. Because of their ability to bring additional competing program services into local television markets and their perceived potential to operate as "gatekeepers" who control the off-the-air program services available to their subscribers, cable systems were viewed early in their development as potentially harmful to local broadcast television service. The Commission was initially reluctant to assert jurisdiction over the cable industry and to regulate its activities.[8] However, in the early 1960's the Commission observed increases in the number of cable systems and undertook to begin developing a comprehensive program for regulating the growth of the cable industry and its impact on the existing broadcast television service. The must carry rules were the cornerstone of this program.

5. The Commission first acted to require cable carriage of local television service in 1962, in *Carter Mountain Transmission Corp.*[9] In that decision, the Commission specified a requirement for carriage of a local television station as a condition for grant of a construction permit for a microwave system to feed distant signals to a rural cable system. This requirement was extended to all microwave-fed cable systems in 1965, in the *First Report*

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[8] *See Frontier Broadcasting Company v. Collier*, 24 FCC 251 (1985); *recon. denied* in conjunction with *Report and Order* in Docket No. 12443, 26 FCC 403, 428 (1959).

[9] *See Carter Mountain Transmisson Corp.*, Docket No. 12931, 32 FCC 459 (1962), aff'd 321 F.2d 359 (D. C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

*and Order* in Docket Nos. 14895 and 15233.[10] A year later, in the *Second Report and Order* in Docket Nos. 14895 and 15233, the Commission applied must carry requirements to all cable systems, regardless of whether or how they imported distant signals.[11] In the 1972 *Cable Television Report and Order,* the Commission "fine-tuned" the must carry rules in accordance with the implementation of comprehensive rules for regulation of the cable industry.[12]

6. In adopting must carry requirements, the Commission held that oversight of cable television was necessary to fulfill its statutory obligations under the Communications Act of 1934, as amended.[13] In this respect, the Commission stated that the Communications Act charges it with the duty "to make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service" (47 U.S.C. §151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. §303(g)). It also stated that it is required "to make

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[10] *See First Report and Order* in Docket Nos. 14895 And 15233, 38 FCC 683 (1965).

[11] *See Second Report and Order* in Docket Nos. 14895 and 15233, 2 FCC 2d 725 (1966).

[12] *See Cable Television Report and Order,* Docket Nos. 18397, *et al.*, 36 FCC 2d 143 (1972). Many of the provisions of the *Cable Television Report and Order,* particularly those pertaining to carriage of distant signals, have now been eliminated. *See e.g., Report and Order* in Docket No. 19859, 57 FCC 2d 68 (1976) [permitting additional carriage of network news programs]; *Report and Order* in Docket No. 20681, 60 FCC 2d 672 (1976), and *Report and Order* in Docket No. 21002, 66 FCC 2d 380 (1977) [modifying and deleting requirements for local cable franchises]; *Report and Order* in CT Docket No. 78-206, 69 FCC 2d 697 (1978) [eliminating certificate of compliance procedures]; *Report and Order* in Docket Nos. 20988 and 21284, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York v. FCC,* 652 F.2d 1140 (2d Cir.), *cert. denied,* 454 U.S. 1143 (1981) [eliminating distant signal and syndicated exclusivity rules].

[13] *See First Report and Order, supra at 697.*

such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. §307(b)). The Commission indicated that under these statutory provisions, its duty was "to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis."[14] If further explained that it sought to fulfill this responsibility through the table of television channel assignments in Section 73.603 of the rules.

7. The Commission's decision to regulate cable systems grew out of its concern that the "explosive" nationwide growth of cable service threatened to harm the existing local television service as provided under the channel assignment plan.[15] After examining the nature and operation of cable systems, the Commission determined that it could not rely on cable as a primary means to achieve its television service allocation objectives. The Commission observed that because of the prohibitive cost of extending cable service beyond built-up areas, cable systems could not serve many persons reached by broadcast signals. The Commission noted that households unable to obtain cable service, and those who cannot afford or are unwilling to pay for it, are entirely dependent on local or nearby stations for their television service.[16] The Commission also considered that local television stations afford a means for community self-expression, whereas very few cable systems originate local programming. Finally, the Commission indicated that it intended for the commercial television system to distribute programs to the public through a multiplicity of local outlets.

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[14] Id. at 699.

[15] Id. at 685-699.

[16] Id. at 699.

8. On this basis, the Commission concluded that cable was a "supplementary" service and that it was necessary to protect local broadcast television service from any adverse effects from competition with cable services, particularly the importation of distant signals. However, the Commission also recognized that cable facilities could provide significant public interest benefits by assisting in expansion of television service in undeserved areas. Thus, the Commission felt that it was of the utmost importance to the public interest that extensions of television service by the auxiliary facilities of cable be accomplished in a fair and equitable manner and that cable and broadcast facilities have complementary, rather than conflicting roles.[17]

9. In developing policy to regulate cable growth, the Commission devoted substantial attention to the economic relationship between broadcast stations and cable systems and the conditions under which competitive impact occurs. The basic analysis of this relationship as relied upon by the Commission was as follows.[18] Cable systems bring to areas already served by one or more television stations the signals of other stations that are well beyond the normal range of reception. These additional signals compete with the local stations for a share of the available audience. If subscribers view distant signals to the exclusion of local stations, the audience will become fragmented and the local stations will lose viewers. As the audience a station can deliver decreases, advertisers will demand lower prices per unit of air time, and station revenues and profits will decline. Decreased revenues and profit will cause the local station to reduce its program efforts, and thereby to reduce its service to the public. Most importantly, it was assumed that in cases where a cable system did not carry a particular local station, each gain of a subscriber by the

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[17] Id.

[18] Id. at 702-703; *see also Second Report and Order, supra at 737.*

cable system would mean the full loss of a potential viewer for the station. The Commission recognized the possibility that the viewer access problem could be solved through the use of A/B switches that would permit cable subscribers to alternate as needed between an off-the-air antenna and the cable.[19] However, it rejected this as a solution on the grounds that then existing switches were ultimately inconvenient and would not be used by subscribers.

10. In view of these considerations, the Commission drew two broad conclusions with respect to cable signal carriage:

> 1) As a competitive practice, the failure or refusal by a cable system to carry the signal of a local station is inconsistent with the principle that cable should supplement, but not replace, over-the-air television service, and;
>
> 2) Because it is inconsistent with the concept of cable as a supplementary service, an unreasonable restriction on the local station's ability to compete, and patently destructive of the Commission's goals in allocating television channels to different areas and communities, a cable system's failure to carry the signal of a local station is inherently contrary to the public interest.[20]

11. The Commission stated that in light of the basic conditions under which competition occurs between cable systems and broadcast television stations, its decision to adopt must carry rules did not depend on a showing that cable competition is demonstrably certain to cause widespread and serious damage to the public interest in television service. It asserted that it would be contrary to the public interest to defer action until a serious loss of ex-

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[19] *See First Report and Order, supra at 702.*

[20] Id. at 705.

isting and potential service had occurred, or until existing service had been significantly impaired—i.e., to wait "until the bodies pile up" before conceding that a problem exists.[21]

12. Nonetheless, the Commission considered the numerous empirical studies and analyses that were available concerning the impact of cable television. It concluded that it was "impossible, from The data at hand, to isolate reliably the effects of [cable] competition from all of the other factors which operate to produce particular financial results in different settings."[22] However, it also found that the available empirical data and studies demonstrated that cable could have a substantial negative effect upon station revenues and audiences.[23] The Commission further concluded that because of cable's rapid growth, the problem was likely to be more serious in the future than it had been in the past.[24]

13. A year later the Commission extended the must carry rules to all cable systems. In its decision, the Commission stated that its analysis with respect to the need for regulatory action in the *First Report and Order* applied equally to nonmicrowave served cable systems.[25] It noted that the economic studies considered in its initial adoption of mandatory signal carriage requirements concerned microwave as well as nonmicrowave cable systems. The Commission declined to conduct a further fact-finding inquiry on nonmicrowave cable systems because such studies were proving to be out-of-date almost before there was time to consider them.

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[21] Id. at 701.

[22] Id. at 710.

[23] Id. at 710-711.

[24] Id. at 711.

[25] *See Second Report and Order, supra at 744.*

14. The Commission has not readdressed the basic rationale or underlying predicates for the must carry rules in the time Since their initial adoption. The rules currently suspended are essentially the version that was adopted in the 1972 *Cable Television Report and Order.*

15. Over the years, the cable industry has continued to grow and develop. Cable systems are no longer simply auxiliary facilities for retransmitting the signals of broadcast television stations. Rather, they have evolved as providers of a multiplicity of video services from a broad range of program sources, some of which are original to cable. These changes have not gone unnoticed by the Commission. In the *Economic Inquiry Report,* the Commission recognized that the growth of cable and other program delivery systems such as videocassette recorders (VCRs) was changing the video services market and that cable in particular was no longer an auxiliary or secondary distribution service.[26] The Commission observed that video services were being provided by a more diverse set of media and that this trend was likely to grow and develop to a greater extent in the future. The Commission further stated that it has become clear that the supply of home entertainment and information services could be increased through this greater variety of delivery alternatives. It concluded that with the advent of these new services, the justifications for attempting to control cable had declined accordingly.[27] This change in the nature of cable and the video industry resulted in the Commission's decision to eliminate most of the rules other than must carry that were adopted as part of the comprehensive cable regulatory plan.[28]

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[26] *See Economic Inquiry Report,* Docket No. 21284, 71 FCC 2d 645-646 (1979); *see also Report and Order* in Docket No. 20988, *supra* at 686.

[27] *See Economic Inquiry Report, supra at 646.*

[28] *See Cable Television Report and Order, supra.*

16. Moreover, Congress recognized the emergence of the cable industry as a major participant in the market for television services in the Cable Communications Policy Act of 1984 (Cable Act).[29] This legislation, which was signed into law on October 30, 1984, amended the Communications Act by adding a new Title VI, entitled "Cable Communications."[30] The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve.

17. *The Quincy Decision.* On July 19, 1985, the United States Court of Appeals for the District of Columbia Circuit ruled in the *Quincy* case that the Commission's must carry rules were unconstitutional.[31] In *Quincy,* the court considered whether the must carry rules violate the First Amendment rights of cable operators, cable programmers and the viewing public. It found that the rules unconstitutionally infringe upon cable operators' rights to freely exercise editorial discretion in selecting the content of program services provided by their cable systems.[32] It further found that the must carry rules could also affect the First Amendment rights of cable programmers and subscribers. In this respect, it indicated that if a cable system's channel capacity is substantially or completely occupied by man-

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[29] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, § *et seq.*, 98 Stat. 2779 (1984).

[30] 47 U.S.C. §521 *et seq.*

[31] *Quincy, supra.* The *Quincy* decision arose from the court's consolidation of two separate cases, *Quincy Cable TV, Inc. v. FCC and Turner Broadcasting System, Inc. v. FCC.* In the former, a cable system challenged a Commission order requiring it to carry certain stations under the must carry rules. In the latter, TBS appealed the Commission's dismissal of its petition for rule making to eliminate the must carry rules.

[32] Id. at 1452.

datory carriage signals, cable programmers may be prevented from reaching their intended audiences and subscribers' viewing preferences may be disregarded.[33]

18. The court used a two step procedure to determine the appropriate standard of review for assessing the constitutionality of the must carry rules. It first evaluated the propriety of applying the lenient First Amendment standard traditionally utilized in assessing the constitutionality of broadcast regulation.[34] Cognizant of the "[S]upreme Court's repeated admonitions to be sensitive to the unique features of each medium of expression,"[35] the court determined that the "scarcity rationale" sustaining much of the regulation of broadcasting "has no place in evaluating government regulation of cable television."[36] The court was unable to discern any attributes of cable that would justify use of the standard traditionally applied to the broadcast media, and concluded that it "must look elsewhere to determine the appropriate yardstick against which to measure the constitutionality of the must-carry rules."[37]

19. The court next considered, but did not decide, whether to apply the balancing test established for "incidental" burdens on speech set forth in *United States v. O' Brien (O' Brien)*,[38] or the more stringent standard for content-based regulations enunciated in *Miami Herald Publishing Co. v. Tornillo (Miami Herald)*.[39] It examined

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[33] Id. at 1453.

[34] *See e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[35] *Quincy, supra at 1444.*

[36] Id. at 1449.

[37] Id. at 1450.

[38] 391 U.S. 367 (1968).

[39] 418 U.S. 241 (1974). *Miami Herald* involved a newspaper, and the First Amendment standards explicated therein are generally applied to the print media. The *Quincy court* explained that "for cable, no less than for other media, the First Amendment draws a distinction between

the purposes underlying the must carry rules and the nature and degree of the intrusions they effect, and was unable to conclude that they burden First Amendment rights only incidentally. In this regard, the court determined that the must carry rules favor one group of speakers, broadcasters, over another, cable programmers; they coerce speech by significantly compromising cable operators' otherwise broad editorial discretion; and, where channel capacity is at least substantially occupied by mandatory signals, they are a barrier between cable programmers and their audience and may cause viewers' preferences to be disregarded. In light of these intrusions on rights and activities protected by the First Amendment, the court had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech."[40]

20. However, assuming for purposes of analysis that the rules impose only an incidental burden, the court concluded that, as written, the must carry regulations are "clearly impermissible" under the *O' Brien* standard.[41] It did not hold that mandatory carriage regulations are constitutionally infirm *per se,* or that the *O' Brien* formula is the appropriate standard for reviewing the constitutionality of cable regulations generally, or must carry regulations specifically. To the contrary, the court explicitly stated that since the rules are unconstitutional under the incidental burdens formula it did not need to "definitively decide" whether a "more exacting" standard is The correct test, and left unresolved whether any form of mandatory car-

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'incidental' burdens on speech—regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas—and restrictions that are intended to curtail expression." *Quincy, supra* at 1450, *quoting Home Box Office, Inc. v. FCC,* 567 F. 2d 9 (D.C. Cir.) *(percuriam), cert denied,* 434 U.S. 829 (1977).

[40] *Quincy, supra at 1453.*

[41] Id. at 1454.

riage requirement could comply with the strictures of the First Amendment.[42]

21. The court stated that under an *O'Brien* analysis, a content-neutral regulation "will be sustained if it furthers an important or substantial governmental interest . . . and if the incidental restriction of an alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[43] In applying the first part of the *O'Brien* test, the court assumed that the preservation of free, locally-oriented television is an important regulatory goal. It Stated, however, that "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms,"[44] and determined that the Commission had not met its heavy burden of demonstrating that the must carry regulation would vindicate the articulated governmental interest.

22. Part two of the *O'Brien* standard as applied by the *Quincy* court balances the governmental interest articulated in part one against the degree of intrusion on protected First Amendment activity caused by the regulation. According to the court, in order to pass constitutional muster, the regulation must be the least restrictive means for protecting a valid federal interest, that is, the restriction on First Amendment rights may be no greater than essential to the furtherance of the governmental interest.[45]

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[42] Id. The court stated that if *Miami Herald* is the appropriate standard for constitutional scrutiny of the must carry rules, it would be unnecessary to test them against any other standard. The court also stated that "once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media is compelling." Id. at 1450.

[43] Id. at 1451, *quoting United States v. O'Brien, supra at 377.* (ellipses in original.)

[44] *Quincy, supra at 1454.*

[45] Id.

23. As part of its determination as to the constitutional sufficiency of the fit between the federal interest in preserving free local television service and the must carry rules, the court emphasized that the distinction between protecting local broadcasting and local broadcasters is critical. It stated that the rules are intended to protect local broadcasting, but, as written, they are overinclusive and indiscriminately protect every broadcaster. In this regard? the court stated that the rules do not take into consideration whether or to what degree the affected cable system poses a threat to the local broadcast station's economic well-being, the quantity of local service available in the cable community, or the number of local outlets already carried by the cable operator.[46]

24. In closing, the court stated that it did not find it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.[47] The court also stated that "[s]hould the Commission wish to redraft the rules in a manner that is more sensitive to the First Amendment concerns . . . it is, of course, free to do so."[48]

25. *The Notice of Proposed Rule Making.* Subsequent to the *Quincy* decision, the Commission received Petitions for Rule Making from the Association of Independent Television Stations, the National Association of Broadcasters, *et al.*, and the Corporation for Public Broadcasters, *et al.* (CPB), concerning cable carriage of broadcast television

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[46] Id. at 1460. Additionally, the court noted that the rules apply with equal force to all cable systems and do not distinguish among cable systems based on their channel capacity or the extent to which they are saturated with must carry signals. Id. at 1462, n. 55.

[47] Id. at 1434.

[48] Id. at 1463.

signals.[49] These petitions asked the Commission to adopt new must carry rules that would meet the constitutional concerns raised by the court.

26. In response to these petitions, the Commission adopted a combined *Notice of Inquiry and Notice of Proposed Rule Making (Notice)* on November 14, 1985, 50 FR 48232, to consider the matter of signal carriage rules for cable systems. Eighty-five parties filed comments and twenty-eight parties filed replies in response to the *Notice*.[50] In addition, many members of Congress submitted letters concerning this matter and many other parties filed informal comments.

27. On March 21, 1986, several of the major broadcast and cable industry associations submitted an "industry agreement" to the Commission for consideration as a plan for new must carry rules.[51] In response to the filing of the industry agreement, the Commission issued an *Order* on March 25, 1986, 51 FR 11073, requesting additional comment on the must carry matter and the industry proposals in particular. Sixty-four parties filed formal comments addressing the industry agreement.[52]

28. *Overview of the Decision.* In the time since the *Quincy* decision, the Commission has been without a com-

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[49] NAB was joined in its petition by the Association of Maximum Service Telecasters, the Station Representatives Association, the American Broadcasting Companies, Inc., CBS Inc., the National Broadcasting Company, Inc., the ABC Affiliates Association, the Spanish International Communications Corporation, Bahia de San Francisco Television Company, The Seven Hills Television Company, and the National Religious Broadcasters. CPB was joined in its petition by the National Association of Public Television Stations and the Public Broadcasting Service.

[50] A list of parties filing comments in response to the *Notice* is provided in Appendix A.

[51] *See footnote 4, supra.*

[52] A list of the parties filing responses to the industry agreement is provided in Appendix A.

prehensive system of rules for regulating cable subscribers' access to broadcast signals. We recognize that this situation has been the subject of considerable concern on the part of broadcast interests and, more recently, many members of Congress and their staffs.[53] In this respect, it has been expressed that there is need for new must carry rules and that we should act expeditiously to complete this proceeding. In view of these concerns, we believe it is appropriate and desirable that we not delay our decision in this matter.

29. In considering the matter of signal carriage regulation for cable television systems, we will begin with an examination of the federal interests that may be affected by issues pertaining to cable carriage of broadcast stations. We next will examine the need for regulation to protect our federal interests. In this context, we will consider the various proposals for addressing the need for regulation and then will discuss our decision to adopt a two part regulatory program that will eventually eliminate the need for cable mandatory signal carriage regulation.

## SUMMARY OF THE RECORD

### Comments Concerning the Federal Interest

30. Broadcast interests argue that the Commission's fundamental statutory obligation to promote the widest possible dissemination of local television service will be jeopardized if cable television systems are not subject to some form of mandatory carriage requirements. In particular, broadcasters cite the Commission's adoption of the TV Table of Allotments which is designed to assure that

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[53] Specific plans and proposals for resolving the must carry matter were submitted to the Commission by Senator John C. Danforth, Chairman of the Senate Committee on Commerce, Science, and Transportation and Congressman Timothy Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance.

as many communities as possible have the opportunity for at least one station. They remind the Commission that under its localism policy, broadcasters have a responsibility to provide public service programming that is responsive to the needs and issues in their local communities. Broadcasters generally submit that although recent deregulation decisions have allowed licensees more flexibility as to how these requirements are met, the basic statutory obligations underlying them have not changed. In this respect, NAB quotes the Commission's statement in the *Report and Order* in the TV deregulation proceeding that each commercial television station continues to be "subject to an obligation to provide programming that is responsive to the issues confronting its community."[54]

31. Broadcasters view must carry rules as a means by which the Commission acted to preserve and to foster the localism concept and its associated local public service objectives. According to the NAB, in the early days of the cable industry, the Commission recognized the potential of cable systems to interfere with its television allocations scheme, and to advance or hinder the implementation of its localism policy. NAB submits that the Commission recognized the technical capability of cable systems to provide service to areas that had no off-the-air reception due to terrain problems and the fact that cable would be available only to those willing or able to pay for it. It states that the Commission asserted jurisdiction over cable to preserve and continue the growth of the local television system. The United States Catholic Conference (Catholic Conference) also points out that Congress assumed the continued existence of the must carry rules and reaffirmed the principle that local communities should be able to receive locally-oriented broadcast programming when it enacted the Cable Act. Finally, numerous broadcasting interests comment that the Quincy decision in no way altered the Com-

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[54] *See Report and Order* in MM Docket No. 83-670, 49 FR 33588.

mission's statutory obligation to establish, foster, and maintain a locally-oriented broadcast system.

32. Senator John C. Danforth, in a letter to the Commission dated July 22, 1986, submits that cable's ability to perform gatekeeper functions conflicts with three long-standing substantial government interests. He states that these interests are the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

33. Most commenters opposed to new must carry rules do not dispute the government's interest in localism, although some point out that the *Quincy* court assumed, without deciding, that the goal of encouraging localism qualifies as important or substantial under the standard enunciated in *United States v. O' Brien (O'Brien).*[55] However, parties representing cable interests argue that the factors underlying the federal interest in must carry regulation have changed and that to continue policies that further localism through signal carriage regulation will not necessarily further the public interest. In statements generally representative of these parties, NCTA argues that the Commission's responsibility under the Communications Act is not simply to foster localism, but rather is to promote the efficient distribution of service. It, therefore, submits that the Commission should base its decision in the must carry matter on the impact of that action on the development of a television system that maximizes access to the marketplace of ideas. NCTA asserts that must carry regulation is not warranted under this standard. In arguing this point, NCTA contends that the nature of cable television has changed significantly in recent years. It states that virtually all cable systems now offer their sub-

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[55] 391 U.S. 367 (1968).

scribers a multitude of video programming options in addition to retransmitting broadcast signals and that as a result, cable television is no longer regarded as merely ancillary to broadcasting. On this basis, NCTA states that cable provides an independent voice and that this has been recognized by The court in *Quincy*. It further submits that in the Cable Act, Congress recognized the importance of the cable industry as a participant in the national communications system.

34. Several commenters submit that many cable systems now provide their own independent local programming. In particular, the Connecticut Cable TV Association (Connecticut Cable) indicates that The cable systems in its state often provide more local programming Than broadcast stations, Connecticut Cable further contends that nearby out-of-state stations that have must carry status generally do not provide programming directed to the local Connecticut population it serves.

35. A number of cable parties contend that the Commission's interest in protecting local television is no longer relevant in view of its decision to eliminate the television programming guidelines in the *Report and Order* in the TV deregulation proceeding.[56] NCTA, nineteen cable operators filing joint comments (Nineteen Cable Operators), and others observe that although the Commission has not completely abandoned its policy that all broadcasters should be responsive to local needs and interests, it has eliminated virtually all of the specific programming guidelines for broadcasters on the ground that market forces, including competition from cable, provide an adequate incentive for broadcasters to meet the needs of their audiences. The Nineteen Cable Operators observe that a commercial broadcaster, exercising its good faith judgment, is now free to present no local news or public affairs program-

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[56] *See Report and Order* in MM Docket No. 83-670, *supra*.

ming.[57] It states that under these circumstances it seems incongruous for broadcasters to claim a federally-mandated right to displace the local programming which is being provided by cable systems. The Nineteen Cable Operators argue that the fact that local news, public affairs, or any other form of local programming is now totally discretionary with a television licensee undercuts the localism rationale for the must carry rules. Similarly, the Community Antenna Television Association (CATA) argues that the concept of localism is suspect absent a newly articulated definition of what it is, what it is intended to accomplish, and what a broadcast station must do To qualify under the new definition. Tele-Communications, Inc. (TCI) states that ensuring that the maximum diversity of information is available to the public by cable is more important than the substantiality of the government's interest in local broadcasting.

**Comments Concerning the Need for Regulation**

36. Commenting broadcasters generally believe that the Commission's localism policy will be threatened in the absence of must carry rules. They generally submit that they would lose audience without cable carriage and that the resulting lower revenues would pose a threat to the viability and existence of many stations. Broadcasters submit that must carry rules are needed to protect the free, over-the-air television system from this impact. The City of Boston stresses that it is important to protect local broadcast television stations because they are still the primary source of local news, public affairs, and other information

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[57] *See Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom, Action for Children's Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

programming.[58] Broadcasters also contend that the potential for harm is great now because nearly half of the nation's TV households are dependent on cable for delivery of their television service.

37. Press Broadcasting Company and several others question the value of the requirement for local stations to present issue-responsive programming if the audiences those programs are intended for will not be readily able to receive them. In this respect, Cape Video Network contends that cable operators should shoulder part of the burden to foster localism through a requirement to carry local signals.

38. Several broadcasting interests contend that cable operators will be able to exert extensive power over the local broadcasters if they are not subject to must carry rules. Broadcasters assert that cable operators are typically monopolists within their service areas and can act as "gatekeepers," deciding which broadcast stations, if any, are carried by their systems. They argue that cable operators, by using this advantage, can prevent local stations from reaching the audiences they are licensed to serve, Tribune Broadcasting (Tribune) argues that without must carry requirements a local broadcaster's access to its service area will be subject to the whim of the cable operator, who is a competitor, Senator Danforth, in his July 22, 1986, letter states that there are two characteristics of cable that justify mandatory carriage requirements: first, that viewers may need cable service to receive local broadcast signals and; second, that most cable systems have a monopoly in their franchise area.

39. A number of broadcast interests express concern that cable operators consider local independent stations to

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[58] The City of Boston comments that cable carriage of the eleven local stations in the Boston area would provide in excess of 100 hours of local news and public affairs programming each week to cable subscribers.

be undesirable inputs to cable service even if the stations' signals are popular with subscribers and the cable systems have channel space available. These parties, particularly INTV, allege that this attitude arises because cable operators consider independent stations to be competitors in the local advertising market. They contend that a cable operator will desire to keep the signals of local independent stations off its cable system so that local advertisers will be induced to buy time on the cable system's own channels. Broadcasters also argue that some cable operators hope to drive the local independent stations off the air in an attempt both to raise local advertising rates and to force local advertisers to buy time on their cable systems' program services.

40. Numerous parties, representing several classes of broadcast stations, fear that their stations would not be carried by cable systems without mandatory carriage rules. These commenters principally include licensees of: 1) new UHF independents; 2) UHF network affiliates in markets where more than one station is affiliated with the same network; 3) smaller market UHF stations; 4) minority owned and operated stations; and, 5) public broadcasting stations. In general, these broadcaster claim that without cable carriage they will be unable to reach the audiences they are licensed to serve and will be competitively disadvantaged against other local broadcasters. UHF broadcasters state that they are more dependent than VHF stations on cable carriage due to the reception problems that are inherent to UHF signals. Several new stations that anticipated cable carriage when they began operation claim that they are already experiencing difficulty in obtaining cable carriage, are being carried on tiers other than basic service, or are being required to pay for cable carriage. Some of these commenters believe that cable operators have an incentive to keep new stations off the air. In this respect, they point out that cable penetration and demand for pay services are highest where there are few

local stations and that cable operators now compete with broadcasters for local advertising.

41. According to the NAB, absent assured cable carriage, new stations in particular are caught in a "vicious financial vise." NAB and other commenters state that without mandatory carriage rights, new stations will not have access to cable households that represent a substantial portion of their potential audiences. They claim that this loss of audience will impair the ability of new stations to generate revenues that are needed to purchase and produce quality programming. These parties state that without such programming, new stations cannot attract the audiences that would indicate subscriber demand for their services and earn them the cable carriage afforded more established stations.

42. Minority and public broadcasters comment that non-carriage of their stations will deny their audiences access to the diverse programming they offer. Howard University, *et al.*, asserts that cable subscribers will not have the opportunity to be exposed to minority programming if minority-oriented stations are denied carriage. In its view, this would be an infringement on the First Amendment rights of minority broadcasters. Spanish International Network (SIN), *et al.*, licensees of Spanish language stations, state that a cable operator's decision not to carry one of their stations would deprive Spanish-speaking viewers of the unique ethnic-oriented programming that reflects their nondominant cultural identity and is in many cases the only programming these viewers can understand.

43. Public broadcasting commenters note that congress and the Commission historically have established policies that encourage the development of independent, local public television stations to provide alternatives to mass appeal programming, to serve neglected and undeserved audiences, and to respond to community needs. CPB and the other commenting public broadcasting interests believe that

in the absence of must carry rules their stations will not be carried by cable operators, especially in areas where there is more than one such station.[59] They contend that the resulting loss of audience will lead to a loss of financial support that will weaken the public broadcasting system as a whole and thwart their mandate to provide diverse programming.

44. Sixteen parties,[60] representing UHF stations generally of the classes claiming they are at greatest risk, describe instances Wherein they have been disadvantaged by the invalidation of the must carry rules. Specific situations described by these parties include requests for payment for signal carriage, refusals to carry a station's signal, and discontinuances of signal carriage. In general, these commenters believe that absent any must carry rules, they will not continue to receive the same quality cable carriage that they have had in the past and will thereby be disadvantaged in the competitive media environment.

45. Broadcasting interests argue that there is no satisfactory means of preserving localism if cable operators are not required to carry all local broadcast stations. They state that the often suggested option that cable subscribers could use an A/B switch and an antenna to obtain access to local signals that are not available on their cable systems is not a viable alternative.[61] In this respect, they state that subscribers are not likely to go to the trouble and expense necessary to receive those local signals that

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[59] In its reply comments, CPB explains that multiple public stations in a market are not like duplicating commercial network affiliates. CPB states that public stations do not provide duplicated programming, but offer unique and distinct services to discrete audiences or offer viewers programs at different times.

[60] Nine television stations filed comments claiming that they are especially at risk in the absence of must carry rules. In its comments, INTV reports seven additional stations that claim to be threatened.

[61] *See* footnote 18, *supra.*

are not carried on cable. Broadcasters further contend that in many locations there is not acceptable over-the-air reception, especially for UHF stations, and that cable delivery is the only practical means for receiving local broadcast signals in such areas. In addition to the concerns about A/B switches reported in the comments, INTV elsewhere argues that these devices are not a solution to the must carry matter.[62] In particular, INTV adds that cable companies routinely volunteer to remove antennas from new subscribers' homes and that to deny carriage to local stations that are most competitive with cable services where cable operators sell local advertising will tend to perpetuate network domination of the television industry.

46. The NAB submitted a study, prepared under its auspices by the ELRA Group, Inc., that examined the extent to which cable subscribers can view local, off-the-air signals without benefit of cable carriage. Based on a sample of 610 cable households, This nationwide study of cable households found that: 1) very few cable subscribers currently have an outdoor antenna and an A/B switch; 2) most cable homes do not have roof top antennas connected to their cable sets: and, 3) a significant number of subscribers may not be able to have an outdoor antenna because of restrictive local regulations prohibiting antennas.[63]

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[62] "The A/B Switch: A Non-solution to Must Carry", INTV, cited in "Broadcasting", June 23, 1986, at 75-76.

[63] The ELRA study's principal findings include:

1) One percent of cable subscribers now have an outdoor antenna and an A/B switch;

2) Two percent of cable homes use rooftop antennas in connection with their cabled television receivers;

3) Over half of cable households have never had an outdoor antenna:

4) About half of the cable subscribers who ever had a rooftop antenna

The ELRA study estimates that the cost to cable subscribers to obtain off-the-air reception capability could range from $458 million to $863 million. NAB states that these findings indicate that in the absence of must carry rules, cable subscribers could be forced to spend hundreds of millions of dollars on outdoor antennas, A/B switches, and switch installations and still would not have full assurance of being able to view local television signals, NAB also believes that ELRA's cost estimates are conservative and that the actual cost to cable subscribers could be as high as $1.6 billion.

47. NAB also submitted a statement describing technical problems associated with the use of A/B switches to enable viewers to switch from cable to off-the-air reception. Its analysis determines that this approach appears costly, complicated, and inconvenient to viewers. In particular, NAB concludes that: 1) an A/B switch must be connected to a properly maintained antenna to be effective; 2) installation of The Switch and/or antenna may require professional help; 3) installation becomes more complicated and may require additional equipment if a VCR is involved.[64] 4) the currently available A/B switches do not have a remote control feature; 5) cable-ready television sets will not receive UHF signals off-the-air in the cable mode;[65] and, 6) some A/B switches can increase signal leakage.

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have taken it down;

5) Over forty percent of those who removed their antennas took them down because of their belief that cable service made them unnecessary;

6) Almost one-third of cable subscribers were told by their cable system that they would no longer need a rooftop antenna; and,

7) Almost two-thirds of all cable subscribers said that better reception was a principal reason for subscribing to cable service.

[64] The ELRA study indicated that one-third of cable homes now have VCRs.

[65] Cable service generally connects to the VHF antenna terminals of

48. The broadcast interests commenting on the compulsory copyright license state that it is a government intrusion into private negotiations for the use of copyrighted material. They state that the compulsory license is unfair because local television stations have always been required to bargain in the market for every television program they seek to exhibit, while cable television operators have been free to carry television broadcast programming at no charge for local retransmissions and at lower than market rates for distant signals. Furthermore, they State that since 1980, cable operators have been able to disregard the copyright exclusivity paid for by the local broadcast station purchaser of a syndicated television program by importing a distant station's transmission of the same program. They note that before *Quincy*, these was the countervailing consideration that the local station could at least be assured that its programming would be available to all television viewers in its home market, both over the air and on cable. Commenting broadcasters argue that the *Quincy* court was incorrect in determining that the must carry rules were simply a referential aid in the determination of the royalty fee and that, in fact, the must carry rules were intended, in part, to balance the benefit provided to cable systems by the compulsory license.

49. The government parties commenting on the compulsory license are in full agreement that it is an over-regulatory mechanism that grossly distorts the efficient development of a truly competitive video market. The National Telecommunications and Information Administration (NTIA) states, and the Department of Justice (DOJ) concurs, that the compulsory license tends to discourage the production of additional, innovative programming. They be-

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TV receivers and, therefore? does not affect the use of the receivers' separate UHF antenna terminals. Thus, reception of UHF signals generally does not require use of an A/B switch, except in those cases where the receiver's cable ready feature operates in a manner such that its use disables the UHF antenna input terminal.

lieve that by artificially depressing the price paid by the cable industry for television broadcast signals, the compulsory licensing system encourages cable systems to retransmit more signals than they otherwise would. Thus, they argue that the compulsory license system serves to limit the realization of the full potential of cable television as a program distribution medium and as an alternative source of independently produced programming. The government parties state that the compulsory licensing scheme constitutes an irrational government-granted subsidy for one segment of the mass media industry. They further submit that compulsory licensing is manifestly unfair because it denies program producers the right to control the distribution and price of their product. Thus, they are concerned That the flow of investment into the programming industry may be affected. The Federal Trade Commission (FTC) argues that it is most likely that the government determined rates are incorrect and, thus, the rate-setting and royalty distribution mechanisms of the compulsory license may have led to a tendency toward reduction in the variety of programming available to consumers.

50. The government parties also agree that there appear to be few, if any, public interest benefits accruing from the compulsory license. The government parties state that a free market environment would not mean the end of the distant signal carriage market. They note that a number of satellite program distributors have come into existence in the unregulated market and act as intermediaries between copyright holders and cable operators. The government parties state that cable operators do not deal with the copyright holders of each program appearing on the satellite service, but rather deal with the program distributor who serves as an intermediary. Thus, they believe that an unregulated market in distant signal programming would quickly spawn the development of private institutions to broker the sale of distant signal programming to cable operators.

51. Finally, NTIA agrees with the broadcast parties that the vacated must carry rules and the compulsory license statute are necessarily linked together. They state that "[w]ith the court's elimination of the FCC's 'must carry' rules, the right of zero-cost access previously enjoyed by local broadcasters to local cable systems dissipates." NTIA argues that if cable systems are now to enjoy the right to pick and choose among local broadcast signals, any rationale for granting the cable industry, in effect, an exemption from the ordinary workings of the copyright laws also is vitiated.

52. Cable interests generally refute the contention that signal carriage regulation is necessary to preserve the Commission's localism policy. Cable commenters contend that even if it is determined that broadcast programming deserves special treatment because of its local nature, there is no evidence that audiences will be deprived of access to broadcast stations in the absence of mandatory carriage rules. In statements representative of these interests. NCTA states that cable operators have an economic incentive to provide locally-oriented programming because they operate in a highly competitive market and can ill afford to be insensitive to the requirements of their subscribers. NCTA observes that according to recent audience surveys, local broadcast signals still attract a major share of cable audiences.[66] It argues that cable operators, therefore, have an economic incentive to continue to carry these local broadcast signals because they are popular with subscribers. Cable parties claim that the loss of guaranteed cable carriage is likely to have only a slight effect on local broadcasters. They contend that if the service broadcasters

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[66] For example, in its comments, NCTA cites a recent survey that indicates that broadcast stations, "excluding superstations," received more than 70 percent of the audience in cable households during the first nine months of 1985. Cable Television Advertising Bureau, *Cable Market Update*, 1985.

provide is truly local and desired by cable subscribers, then viewers who wish to receive that service will be able to do so by using off-the-air reception capability. The National Telephone Cooperative Association comments that the must carry rules tended to protect local broadcasters and not local broadcasting.

53. Cable interests generally argue that there is no evidence of need for regulation to protect local broadcasting. The cable and citizens' groups submitting comments opposing new must carry rules state that the performance of the cable industry post- *Quincy* provides convincing evidence that cable companies generally have not dropped the local broadcast signals that they had been carrying before the *Quincy* decision. They point out that there are no "dead bodies" on the landscape. These commenters also state that most broadcast stations will continue to be carried in the future because cable must satisfy subscriber preferences, which include broadcast television.

54. The staff of the FTC submitted an empirical study which indicates that, absent must carry rules, cable systems can be expected to carry many or most local broadcast stations. The FTC study evaluates the local broadcast signals carried by satellite master antenna television (SMATV) systems. SMATVs differ from conventional cable systems only in that they tend to serve buildings with multiple dwelling units and are not subject to the must carry rules. Thus, the FTC staff believes that an analysis of the behavior of SMATVs with respect to local broadcast signals should provide the Commission with a strong indication of the likely behavior of cable systems in the absence of must carry regulations. Their study of 24 SMATV systems reveals that carriage of local stations appears to be profitable and that local stations occupy on average almost half of the available channels on the systems. The FTC staff also examines how the proportion of local stations carried by SMATVs varies with the number of local broadcast stations and the number of available

satellite programming services. This analysis indicates that: 1) an increase in the number of local stations is associated with an increase in the number of local stations carried by a SMATV, but the increase in local stations carried is lower than the increase in local stations—i.e., not all additional local stations are carried; and, 2) an increase in the availability of satellite services tends to reduce carriage of local stations. Based on this study, the FTC staff predicts that, absent a must carry rule, more than half of the local broadcast stations will be carried on cable systems and, in most cases, the proportion could be expected to exceed one-half by a large margin.

55. DOJ also does to believe that must carry rules are necessary to preserve and foster localism. In DOJ's view, the Commission cannot justify a need for must carry rules to further localism without demonstrating that the competitive marketplace will not ensure a desirable level of local television service. DOJ further states that the Commission has never maintained that the protection of all local broadcasters is necessary to foster the goal of a national broadcasting system. It submits that the possibility that some marginal individual broadcast stations may not survive without mandatory carriage rules is not a sufficient reason to reimpose such rules to preserve localism. DOJ further states that under *Quincy* the Commission may not reimpose must carry rules without first defining, in objective terms, the minimum amount of local broadcasting necessary to serve the public interest, and then demonstrating that absent regulation, local broadcasting would be reduced below that minimum.

56. Parties representing cable interests generally contend that the adoption of new must carry rules would limit rather than promote program diversity. In this respect, the Nineteen Cable Operators state that must carry rules displace cable programmers' only means to reach their audience, in favor of television broadcasters who have an alternative delivery mechanism to reach the public. They

also submit that mandatory carriage rules do not prevent unfair competition because cable carriage alters the over-the-air competitive situation between broadcasters in a given market. Cable operators argue that must carry rules give broadcasters an unfair advantage over cable programmers who are not provided a similar guaranteed means of reaching their audience. Finally, Nineteen Cable Operators state that must carry regulations unfairly hamper cable operators who must compete with alternative video entertainment delivery systems which have no similar mandatory carriage requirements.

57. Several operators of cable programming services state that any must carry rules will preclude them from providing valuable and unique non-broadcast programming to their subscribers. TBS, the Eternal Word Television Network (EWTN), and others contend that cable channel capacity is generally limited, and that must carry requirements further limit the number of channels available for cable programming services.[67] EWTN contends that the proliferation of new UHF stations burdens cable systems and forecloses entry for new cable networks. Tele-Communications, Inc. (TCI) asserts That mandatory carriage rules impede the Cable Act's stated purpose of ensuring diversity on cable.

58. Proponents of the compulsory license contend that a "free market" in the distribution of distant signal programming would ensure the virtual elimination of a distant signal market. This argument is based upon the assumption that the costs to cable operators of negotiating, monitoring, and enforcing contracts with each and every program producer regarding each and every program exhibited on a distant signal would be prohibitively high.

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[67] For example, TBS notes that despite the publicity given to a few new cable systems with 50-100 channels, over 38.7 percent of all systems have 20 or fewer channels and 12.4 percent of all systems have 12 or fewer channels.

Cable operators claim that by eliminating the need for costly individual contracts, the compulsory license statute renders the existence of a distant signal market possible. NCTA, in its comments on the compulsory license, states that Congress did not see any connection between the compulsory license and mandatory local carriage. NCTA further states that the compulsory license reflects its agreement with the Motion Picture Association of America (MPAA), in which broadcasters played no part of record.

**Proposals**

59. In the *Notice,* we requested comment on the proposals filed by INTV and the public broadcasters and the concerns raised by the NAB. Interested parties were also invited to submit other specific proposals that would meet the constitutional concerns raised by the court in *Quincy.* In addition, we requested comment on the impact of these issues on the compulsory licensing scheme and our authority in this area. In the subsequent *Order,* we invited comment on the industry agreement and the more general question of whether local broadcast service and the concept of localism as a communications policy are sufficiently important to warrant an intrusion on cable operators' First Amendment rights.

60. The *INTV Permissible Signal Carriage Rule Proposal.* In the *Notice* we indicated our intention to examine the communications policy implications of cable's compulsory copyright license in light of the *Quincy* decision. In this regard, we requested comments on the permissible signal carriage rule proposed by INTV. Under this proposal, the cable operator would choose either to invoke the compulsory copyright license by carrying all signals considered "local" under the rule, or to negotiate separately with copyright holders for use of their work. The proposed rule is based on Section 111 of the Copyright

Revision Act of 1976 (Copyright Act).[68] It provides: Cable Television carriage of television broadcast signals is permissible, for purposes of Section 111 (c) of the United States Code, if the cable system carries, as part of the basic tier of cable service regularly provided to all subscribers at the minimum charge, the entire signals of all local television broadcast stations without discrimination or charge. A television broadcast station is "local" as to a cable system if the cable system lies within the "local service area" of the television station, as defined in 17 U.S.C. Section 111(f).[69]

We solicited comments on the Commission's authority to adopt INTV's proposed rule and whether this proposal meets the constitutional concerns raised by the *Quincy* court.

61. Fifty-five of the commenting parties address INTV's proposal. About half of these commenters are broadcasters who support the proposal as a viable means to restore balance to the cable-copyright market. Some of these broadcasters would prefer new must carry rules, but consider this proposal an acceptable alternative. Some commenters suggest modifications to the rule proposed by INTV.

62. In its comments, INTV states that the proposed rule is a pragmatic solution to the market imbalance created by *Quincy* between cable's retransmission of broadcast television signals and the compulsory copyright license. INTV contends that the proposal is not for a must carry rule, but rather a "may carry" rule that would affect only a

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[68] Copyright Revision Act of 1976, 17 U.S.C. §111.

[69] Section 111(f) states in pertinent part: "The local service area of a primary transmitter in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976."

cable operator's method of payment for the right to retransmit broadcast television programming. If further submits that the proposed "may carry" rule is constitutional and the Commission has the authority to adopt it.

63. INTV states that the Commission's authority to adopt the proposed rule is derived from the "plain meaning" of Section 111(c)(1) of the Copyright Act, which makes cable systems eligible for compulsory licensing "where the carriage of the signals comprising the secondary transmission is permissible" under the Commission's rules. INTV states that the legislative history of the Copyright Act demonstrates an inherent and inextricable legal tie between the must carry rules and the compulsory license. INTV states that in their 1971 "Consensus Agreement," broadcasters, cable operators and program copyright owners agreed to support both local carriage rules and the compulsory licensing scheme. Many commenters supporting the proposal endorse INTV's rationale or proffer similar arguments regarding the Commission's authority. Other supporters assume the Commission's jurisdiction without discussion.

64. INTV states that its proposal is constitutional because it is a "may carry" rule that would not require or prohibit carriage of any or all television signals. Therefore, it states that the proposed rule would not infringe cable operators' First Amendment rights and, thus, would not even be subject to constitutional scrutiny. INTV also contends that it is constitutional to condition a cable operator's eligibility for compulsory licensing on its carriage of all local television signals. In this regard, INTV states that copyright is a constitutionally authorized protection, but that the compulsory license is a statutory benefit to which there is no constitutional right. INTV and some commenters argue that the proposed rule would not infringe on a cable operator's First Amendment rights and that the Commission's authority under Section 111(c)(1) of the Copyright Act includes the power to condition eligibility for

the statutory benefit of the compulsory license. Overall, the proponents generally agree with INTV that the proposed rule is constitutional under *Quincy*.

65. Cable interests, DOJ, NTIA and the FTC oppose INTV's proposal. These parties state that it would effectively force cable systems to carry all local television signals and, therefore, it is a form of reimposition of the must carry rules. Similarly, in DOJ's view "the proposal represents an effort to coax cable systems into carrying all local broadcast stations by threatening to withhold a privilege accorded by Congress." Cable interests favor maintaining the compulsory license in its current form. The FTC and NTIA state that the compulsory license should be repealed in favor of free markgtplace negotiations.

66. Opposing parties also state that the Commission does not have the authority to adopt INTV's proposal. They generally concur with DOJ, which states "[w]e do not believe that the Commission may avoid the limits on its ability to determine copyright policy by defining as impermissible, for purposes of Section 111, carriage that is permissible for communications purposes." Many commenters cite *Quincy* to support the position that the compulsory license is linked only to carriage of distant signals, for which the must carry rules in effect as of April 15, 1976, were "frozen" as a definitional reference to distinguish local from distant signals.[70] These commenters claim that invalidation of the must carry rules is irrelevant for copyright purposes and that new rules affecting local signals would not affect the compulsory license.

67. Opponents generally believe that INTV's proposal is an attempt to circumvent the *O'Brien* test. They contend that this proposal, therefore, raises substantial First Amendment concerns. For example, many of the oppo-

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[70] *See Quincy, supra* at 1454 n. 42.

nents state that the commercial impracticability of separate copyright negotiations will force cable operators to carry all local television signals in order to avail themselves of the compulsory license. As a result, they argue, INTV's proposal relates to program content and, thus, is subject to constitutional scrutiny. Opponents also contend that this proposal is unconstitutional because only Congress, and not the Commission, may legitimately attach conditions to the government bestowed benefit of the compulsory license. Others argue that INTV's proposed rule would abridge cable operators' Fist Amendment rights by conditioning eligibility for compulsory licensing on the relinquishing of their editorial discretion.

68. *Proposals for Requiring Carriage of New Stations.* Several commenters express concern about the viability of new stations entering local television markets without the competitive equalizer of cable carriage. These parties believe that new stations which as of the *Quincy* decision either had not begun operations or captured the attention of their local television market audience or advertisers, will suffer the greatest competitive harm absent rules assuring them cable carriage. These commenters contend that unless new stations are protected, the nation's system of over-the-air broadcast television will be jeopardized. A few of these parties propose rules or suggestions designed To aid new stations. The consensus among these parties is that new stations should be carried by cable systems for a specified period of time. The time periods proposed for carriage of new stations vary from 18 months to five years.

69. Grace Cathedral, Incorporated (Grace) proposes to protect new stations using a copyright-based signal carriage rule. The proposed rule would condition availability of the compulsory license on the carriage of all "eligible" television stations, i.e., those licensed for fewer than five years and within whose specified zone the cable system lies in whole or in part. It would require carriage of the entire signals of all eligible new stations without discrim-

ination or charge on the cable system's basic tier of service until their period of eligibility has expired. The proposed rule would allow cable operators to elect not to use the compulsory copyright license and to "opt out" of the carriage requirements by complying with the requirements for providing written notice of the same to the Commission.

70. Grace argues that there is need for this form of regulation because cable poses an especially acute threat to new broadcast stations that have difficulty obtaining advertising revenue during their first few years of operation and cannot afford to pay for cable carriage. It asserts that the critical nature of cable access is heightened for new independents that have to compete with local network affiliates that are generally carried by cable systems.

71. In support of its proposed rule, Grace first states that it concurs with INTV's position that the Commission has authority to adopt a copyright-based signal carriage rule under Section 111(c) of the Copyright Act. Grace also asserts that its proposed rule is constitutional. In reply comments, it argues that its proposed rule is a content-neutral measure designed to promote the diversity of voices in the electronic media without unconstitutionally infringing on cable operators' First Amendment rights. In this regard, Grace contends that its proposed rule would not favor a particular point of view and would not discourage cable operators from carrying stations or from originating programming. Grace argues that its proposed rule meets the *Quincy* court's concerns respecting the overinclusiveness of local cable carriage rules. It states that the proposed rule would cure the problem under the previous must carry rules whereby protection was afforded indiscriminately to all broadcasters because it would apply only to new station licensees and only for as long as they reasonably need protection. Grace asserts that the five-year limitation would be a self-regulating device that would be responsive to local conditions since most stations have been

licensed for a longer period of time. It concludes that under its rule, if a station is able to fend for itself after five years, the local market would have an additional viewpoint, and if the station fails, the rule would have functioned properly by having given the new station a chance to succeed.

72. NCTA opposes Grace's proposed rule in part on the ground that the Commission does not have the authority to affect cable's compulsory copyright license. In this regard, it argues that Section 111(c) of the Copyright Act does not authorize the Commission to impose copyright-related conditions on the permissibility of cable carriage of broadcast signals. NCTA contends that if a signal may be retransmitted pursuant to the Commission's rules with respect to communications policy, then it is subject to compulsory licensing. NCTA also asserts that Grace's proposal ignores the *Quincy* court's concerns regarding cable operators' editorial discretion, viewer preferences and interests of non-broadcast cable programmers. It states that this proposal seeks only to protect the interests of individual broadcasters without regard to the economic viability of broadcasting in the particular market.

73. *Proposals for Requiring Carriage of Public Broadcasting Stations.* In the *Notice*, we requested comment on a proposal submitted by CPB and other public broadcasting interests that the Commission adopt a rule requiring carriage? except in limited circumstances, of the entire signal of all public television stations providing Grace B service to all or part of a cable system's community. The public broadcasters' proposal would not require carriage of public television stations that simultaneously broadcast the same programming carried by another public television station. In addition, cable systems with twelve or fewer channels would not be required to carry more than three local public television stations if the systems need channel capacity to carry programming from nonlocal sources. Finally, CPB's proposal requires carriage of the entire signal transmitted

by the station, including services carried on the vertical blanking interval (VBI) or on aural subcarriers.

74. In support of this proposal, CPB alleges that the loss of cable carriage would undermine the financial stability of individual public broadcasting stations as well as the entire national public television system. CPB argues that without cable carriage, local public television stations would find it more difficult, if not impossible, to reach significant portions of the audience on which they rely for support, CPB claims that virtually all public television stations are dependent for support upon viewer contributions and that such funds are the fastest growing source of public televisions' total revenues. CPB also states that viewer contributions are key to fundraising because they are subject to "matching" funds from other sources such as corporate foundations and legislative bodies. Thus, CPB asserts that without cable carriage public television station access to viewers would be restricted and viewer contributions would be reduced, thereby affecting the amount of revenue received from available "matching" funds. CPB further contends that the loss of local viewer support would jeopardize the entire public television system. In this regard, CPB points to the cooperative arrangement among public television stations for financing program production. CPB concludes that if individual public broadcasting stations are financially weakened or forced off the air, the quality and diversity of the programming offered by the system as a whole would be adversely affected.

75. CPB also claims that this proposal complies with the First Amendment requirements established by the court in *Quincy* by stating that mandatory carriage of public television stations furthers a substantial governmental interest and is narrowly tailored to protect that interest. It states that Congress and the Commission have longstanding public interest policies regarding the fostering of a nationwide public television service built on local stations and that public television stations, especially those in the

UHF band, rely on cable carriage to reach their audiences, CPB asserts that its proposal is the least restrictive means of furthering that governmental interest. It submits that this proposal would not require carriage of duplicative program services, but would foster diversity even in the relatively few situations where multiple public television stations must be carried. It states that this diversity in programming is the essence of public television's mission. CPB also claims that its proposal accommodates the First Amendment interest of cable operators by assuring that even the smallest systems have the opportunity to present programming from sources other than local public television stations. It further asserts that required carriage of VBI and aural subcarrier signals is necessary because these technologies permit public television to offer services designed to implement Congress' mandate that public television stations use their facilities to the extent feasible to generate added revenue. In its reply comments, CPB points out that with the exception of public broadcasters, none of the other commenters recognize public televisions' unique role or advance proposals that adequately protect the unique governmental interest in supporting the public television service. Thus, it argues that any of the proposals that would allow the market to determine which stations cable systems would carry are not appropriate.

76. Other commenters who support mandatory carriage of public television stations offer alternative proposals. The Catholic Conference suggests that in order to promote the important governmental interest in the public receipt of locally oriented programming, must carry rules should favor public television stations operating within the cable community. The Office of Communication, United Church of Christ, *et al*, (UCC) jointly propose mandatory carriage for at least one noncommercial station for cable systems within the top 100 markets. UCC's proposal would provide that if there is more than one noncommercial station, the one with the highest local audience would be carried. The

City of New York Municipal Broadcasting System (WYNC) opposes any rule that would limit carriage of public television stations on the ground that such stations provide duplicative programming. WYNC claims that such a ground would not be based upon fact and that any resulting rule would be contrary to the public interest.

77. In opposing the CPB proposal, the Financial News Network (FNN) indicates that prior to *Quincy*, cable systems in major metropolitan areas were required to carry two or more public television stations, many of which duplicated programming of other public stations. FNN claims that the effect of the CPB proposal is nothing more than the reimposition of the former must carry rules found constitutionally invalid in *Quincy*. NCTA echoes this position and points out that, in many instances, the carriage of duplicating noncommercial stations would actually injure the noncommercial station that is most local by diverting local audience contributions. The Nineteen Cable Operators state that the CPB proposal must be rejected since it does not even address the concerns in *Quincy* that must carry rules should be sensitive to factors such as channel capacity, duplicate programming, and the preferences of cable subscribers. The Nineteen Cable Operators also contend that CPB's general allegations of financial harm are totally unsupported and that CPB has, therefore, failed to prove that its proposal is necessary to further a substantial governmental interest and that no less restrictive alternatives are available. They further argue that CPB's claims of harm to public television stations notwithstanding, other alternatives to mandatory carriage exist to protect public broadcasters such as the construction of TV translator and low-power stations, which do not infringe upon The First Amendment right of cable operators. Accordingly, the Nineteen Cable Operators assert that CPB's proposal could not withstand constitutional scrutiny.

78. NAB would treat public television stations in the same manner as commercial stations. That is, cable sys-

tems would not be required to carry duplicate network affiliates (i.e., PBS) and the affiliate in closer proximity to the cable system would have preference. Several other commenters propose a minimum carriage rule that would require retransmission of at least one noncommercial educational station.

79. NTIA's proposal recommends that the Commission adopt a rule mandating that cable systems carry, without charge, the signals of all local nonduplicated noncommercial educational television stations, including translators. These signals would be carried in their entirety on the system's lowest priced tier. NTIA states that noncommercial stations play a unique and important role in providing instructional, educational and cultural programming generally not available on commercial stations.

80. Beyond mandating carriage for public television stations, NTIA believes that the Commission has an obligation to ensure a smooth transition from pervasive regulation to less intrusive market competition. NTIA recommends that the Commission institute a formal, continuing inquiry and fact-gathering process so that the Commission can accurately monitor and assess developments in the less regulated cable-broadcast environment. The Commission should issue interim reports of its findings on a yearly basis. At the end of three years, the Commission should make a formal determination of whether additional must carry rules are needed. In this regard, NTIA states that the Commission is not currently in the position to know whether mandatory carriage rules are needed to protect local broadcasting.

81. Finally, NTIA suggests that the Commission make clear that it would permit affected parties, including local franchising authorities, to demonstrate that a significant governmental interest would be adversely affected absent local must carry protection. It states that if such a showing is made, the Commission can adopt mandatory carriage

rules tailored to that individual marketplace. NTIA further states that a case-by-case review of the need for mandated carriage in an individual television market would enure that the public interest is protected.

82. *Input Selector Switch Proposal.* Richard S. Leghorn proposes two rules that he claims would protect viewers' capabilities to receive over-the-air television in homes that subscribe to cable.[71] The first rule would provide requirements respecting A/B switches and the second rule would establish "may carry" conditions for cable carriage of broadcast signals. Mr. Leghorn contends that these proposals would further the Commission's objectives and be less intrusive into protected First Amendment rights than any mandatory carriage rule.

83. In regard to A/B switches, Mr. Leghorn proposes requiring television set manufacturers to build input selector devices into the sets' channel control systems to permit easy selection between cable and off-the-air programming. In the absence of a manufacturer-provided switch, he would require cable operators to install A/B switches the subscriber homes at cost and would prohibit them from disconnecting UHF antennas. As a corollary to the first proposal, he suggests that cable operators be exempt from the requirement to provide A/B switches if their system carries all local unscrambled VHF signals. A signal would be "local" if its Grade B contour overlaps any part of the cable system's community unit. The second rule proposed by Mr. Leghorn would authorize able retransmission of broadcast signals if carriage is without charge to the licensee, except for reimbursement for costs incurred by the cable system for facilities used to receive the broadcast signal or copyright fees. Additionally, he proposes to require cable systems to carry authorized sig-

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[71] Mr. Leghorn is a cable system owner and a former member of the board of directors of the National Cable Television Association.

nals in their entirety, without alteration or degradation and, if technically feasible, on the same channel number.

84. Mr. Leghorn contends that his proposed rules would ensure that subscribers have the opportunity to view off-the-air or cable programming. Thus, he believes that his proposal would meet the constitutional requirement that incidental governmental regulation of speech be narrowly tailored to meet the interests claimed to require that regulation.

85. NAB opposes the A/B switch proposal on the ground that such devices would not solve the problem of ensuring the availability of broadcast signals to television viewers. In this regard, it claims that in many instances off-the-air reception of broadcast signals is either nonexistent or, where existent, often cannot be received using an A/B switch without the use of substantial additional equipment that is owned by very few cable subscribers. NAB also raises several additional points to support its position that mandatory carriage rules are a solution preferable to A/B switches, including widespread local restrictions on outdoor antenna installation, receiver/switch incompatibility problems, radiation interference and pre-wiring of new homes for cable.

86. *Other Proposals.* CBS Inc. proposes a rebroadcast consent rule. The rule would permit secondary transmission of local or distant television signals by cable systems only upon written consent of the originating station. However, such authority would not be necessary with respect to local signals if the cable system carries all such signals in their entirety on the station's transmission channel, without charge or alteration. CBS states that inasmuch as teletext and multichannel sound are valuable enhancements to, and form an integral part of, main channel programming, the proposed secondary transmission rule would require transmission of these signals as part of the entire broadcast signal. CBS also proposes a conjunctive rule that

would allow cable systems to exclude the teletext, closed captioning and/or multichannel sound portions of the signal, if such retransmission would interfere with main channel programming, unless such interference can be remedied without a significant capital expenditure by the system. CBS asserts that the secondary transmission consent rule would promote competition and diversity in local and national markets and would effectuate the Commission's statutory responsibilities.

87. The Catholic Conference proposes a rule to protect stations which it asserts are at risk and which it believes merit carriage. This proposal Would require cable systems to carry stations that meet any of the following criteria: 1) the station devotes five percent or more of its programming for local interest or is locally originated; 2) the station is a public television station whose signal covers the community served by the cable system; 3) the station is a UHF station whose signal covers the community served by the cable system; or 4) the station is an independent commercial station whose signal covers the community served by the cable system. The Catholic Conference believes that these stations should be favored because they are likely to provide programming designed to meet the needs of the local community served by them and the cable system.

88. The Catholic Conference further espouses a point system for stations by which cable systems would be obliged to fill available channels. Points would be allocated as follows: 1) one point for every five percent of total programming that is locally oriented; 2) one point for a local public television station: 3) one point for a local UHF station; or, 4) one point for a local independent commercial station. The Catholic Conference would have stations annually submit their qualification point accumulations and appropriate documentation to the cable systems upon which they request carriage. The Catholic Conference would allow the cable operator to use its business judgment to

determine which station would be carried in the event two or more stations had the same point total and if the number of qualified stations exceed the number of must carry channels.

89. UCC proposes that cable systems in markets below the top 100 be required to carry all local stations, regardless of channel capacity. Under this proposal, local stations would be defined as those stations whose Grade A contour covered at least one-half the cable system's basic subscribers. UCC asserts that there are usually only a few, perhaps only one, such stations serving a cable community and that their carriage is crucial to people in the rural areas not served by the cable system. UCC believes that cable systems with limited channel capacity in the top 100 markets should be required to carry, in addition to at least one noncommercial station as discussed above:
1) any ethnic or minority-owned station serving a significant portion of the population reached by the cable system; 2) stations with more than 40 percent local programming directed to serving the needs and interests of the community; and 3) all UHF independent stations. It further argues that cable systems with larger capacity in the top 100 markets have incentive to carry all the programming they can obtain and that it is doubtful that there is any regulatory program that needs to be addressed. However, UCC states that the Commission would have full authority to intervene if problems arose with such systems.

90. Many commenters propose a geographic standard for defining "local" signals that cable systems would be required to carry. Most of these parties suggest a 50-mile zone using the city of license or transmitter location as a reference point. Other parties would require carriage of broadcast signals on all cable systems within their area of dominant influence (ADI). Some commenters propose requiring cable systems to carry any station whose Grade B contour overlaps the cable community. UCC suggests

that in markets below the top 100, cable systems must carry any signal whose Grade A contour encompasses at least one-half of the cable households. Lincoln Broadcasting, licensee of KSTF, would require carriage of all foreign language stations within 50 miles. Howard University and several others would require carriage of all local minority-owned stations.

91. Most of the commenters who support some sort of must carry rules would exempt those systems with twelve or fewer channels. Some parties would extend this exemption to systems with more than 12 channels if they have less than 1500 subscribers.

92. *The Industry Agreement.* The industry agreement requires cable systems with more than twenty usable activated channels to carry all qualified local stations, in their entirety, on the lowest priced tier.[72] However, this must carry obligation is subject to stated limitations based upon the number of usable activated channels carried by the cable system. Specifically, the proposal provides that systems with 21 to 26 usable activated channels are required to carry no more than seven qualified local stations. For systems with more than 26 usable activated channels, the proposal specifies that the number of channels subject to the mandatory carriage requirement shall not exceed 25 percent of the channels of the cable system. In situations where the number of qualified local stations is greater than the prescribed cap, the cable operator is given discretion to select among the stations qualified for mandatory carriage.

93. Under the industry proposal, a qualified local station is defined as a broadcast television station that is located

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[72] The agreement defines "useable activated channels" as "those engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies."

within 50 miles of the cable system[73] and that attracts an off-the-air audience that meets or exceeds a minimum viewing standard. To meet the viewing standard a station must receive at least a two percent share and five percent net weekly circulation in noncable homes by county.[74] Only domestically-licensed, primary, full power television stations which deliver a good quality signal to the cable system's principal headend are eligible for mandatory carry status.[75] The scope of the mandatory carriage obligation does not extend to signals contained in the vertical blanking interval. A cable system has the discretion to determine the channel position of the stations subject to mandatory carriage. In addition, it is not required to carry more than one qualified local station affiliated with the same commercial or public television network. However, the agreement specifies that if the system chooses to carry more than one station affiliated with the same network, it will not be subject to network nonduplication restrictions. In addition, a system is barred from charging for carriage for any nondistant signal that is covered by the

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[73] The fifty mile requirement is computed by measuring from the principal cable headend to the reference point of the station's city of license.

[74] The industry agreement utilizes different viewership criteria for new and existing stations. To qualify for mandatory carriage status, an existing station is required to demonstrate, using independent professional audience surveys, that it has achieved the requisite audience share for the previous television survey season. This showing is made on the basis of audience surveys undertaken during a separate consecutive four-week period in each of the four quarters of that season (i.e., April-June, July-September, October-December, and January-March). A new station, in contrast, "may satisfy the viewership test by presenting survey evidence gathered by a recognized rating service" and will retain its status as a qualified station until survey data for its first full television survey season—which extends from April until March—are available.

[75] Low power TV stations, TV translators, and TV boosters do not qualify for mandatory carriage. In addition, television stations licensed by foreign governments are not entitled to mandatory carriage.

compulsory license, whether or not that signal is subject to the mandatory carriage obligation, although a qualified broadcast station will be permitted to reimburse a cable operator for either copyright costs or the costs associated with delivering a good quality signal.[76]

94. Of the parties responding to the Commission's request for comment on the joint agreement, approximately a dozen parties, mainly representing broadcasting interests, express support for the proposal, as submitted. However, among the parties that submitted the agreement, the degree of support varies. NAB, INTV, and TOC strongly support the must carry proposal. NCTA supports the agreement, but believes that the court will have to ultimately decide its constitutionality. CATA does not believe that any must carry rules can meet the standards set forth in the *Quincy* decision. However, CATA states that if the Commission believes that rules are needed, it supports this proposal as workable and acceptable to the affected industry groups. A few commenters, such as DOJ, TBS, and American Cable Publishers Institute (ACPI), oppose any form of mandatory carriage regulation, including the industry proposal. The majority of commenters fall into one of two categories. One group would support the industry proposal if it were modified to protect selected interest groups, as they suggest in their comments. A second group opposes the industry agreement because it does not provide sufficient protection for specified interest groups. Many of the commenters from both of these groups recommend that the Commission either adopt a modified version of the industry proposal or some alternative form of must carry rules. Finally, several commenters offer opinions on selected aspects of the industry agreement without expressing either support for, or opposition to, the proposal itself.

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[76] In resolving disputes over the rules, the industry proposal specifies that the burden of demonstrating a right to mandatory carriage will be borne by the broadcast station.

95. In the *Order*, we requested comment on the industry agreement with emphasis on two specific issues. The first of these issues was the extent to which the parties submitting the industry agreement have been able to successfully incorporate into the agreement the specific interests of the various discrete groups involved. In particular, we indicated that we were interested in the impact of the agreement on broadcasters (noncommercial, commercial, VHF, UHF, new, established, general interest, and narrowcast stations), cable system operators, alternative users of cable channels, cable system subscribers, nonsubscribers and the public in general. Most of the commenters on this issue are broadcasters who believe that their stations will be harmed if the agreement is implemented.

96. Supporters of the industry agreement believe that it generally serves the interests of all parties by balancing the need to provide the public with free, over-the-air, local television service while preserving the maximum flexibility and discretion in cable programming for cable operators. These parties recognize that it is impossible to fully satisfy all interests, but submit that the agreement sets forth a framework for a healthy coexistence of cable and broadcast television that will result in an optimal variety of locally-oriented and other television service. They state that the industry agreement is fair to all types of broadcast stations because carriage rights are determined on a neutral, nondiscriminatory basis. These commenters further state that it protects the public interest by assuring that viewers will continue to receive local programming that is intended to meet community needs.

97. Numerous broadcasting interests assert that the industry agreement accommodates only the economic interests of established commercial broadcast licensees and cable systems. These commenters represent a substantial portion of the submissions the Commission received. They imply that if the specified interest is harmed, the public, both

cable subscribers and nonsubscribers, will be affected by the loss of some television service.

98. CPB and other public broadcasting interests, as well as numerous informal commenters, claim that the industry agreement does not recognize the substantial governmental interest in and commitment to a public broadcasting service that provides programming to a narrow audience group. In particular, the public broadcasting interests argue that the viewing standard is inappropriate and that the use of such a criterion for determining must carry eligibility would penalize local public broadcasting stations for fulfilling the very role that was envisioned for them.

99. Public broadcasters also believe that other elements of the industry proposal would dilute their carriage rights. They claim that their carriage rights would be limited by the use of a 50-mile zone. They submit that the area covered by such zones is often smaller than their Grade B service areas. CPB cites A.C. Nielsen data to indicate that 68 percent of all cable systems, serving 16 percent of all cable subscribers, would be exempt from any carriage requirements because they carry 20 or less channels. Public broadcasters also claim that they are likely to be denied cable carriage in the 47 markets with eight or more television stations, and 67 percent of all television households, if the cap on the maximum number of must carry channels is retained. Again, as in earlier comments, these parties point out that duplicative public broadcasting stations do not provide duplicative service in the same manner as network affiliates. Several of these commenters further state that the failure to require carriage of noncommercial translators and satellite services will undermine many state and regional public television systems that rely on them to overcome the technical difficulties of UHF transmission and extend their service to remote areas.

100. In order to remedy these perceived infirmities with the industry agreement, public broadcasting interests pres-

ent a variety of proposals that would guarantee mandatory carriage to some or all local public broadcasting stations. Among these proposals is the plan submitted by CPB in its initial comments, and supported here by the Ohio Educational Broadcasting Network, to require the carriage of all Grade B noncommercial educational stations on the basic tier. The Maryland Public Broadcasting Commission and NATPE International believe that the agreement should be modified o require carriage of at least one public television station. The Metropolitan Board of Education believes that all local public television stations should be entitled to mandatory carriage rights on all but the smallest systems. NTIA proposes the adoption of a must carry rule that mandates carriage of all nonduplicated noncommercial educational television stations, including translators, in their entirety on the lowest priced tier, but would not extend mandatory carriage to commercial stations.

101. Licensees of other types of broadcast stations that program for narrow interest groups, such as minority, specialty and religious stations, express concerns similar to those of the public broadcasters regarding their ability to attain carriage rights under the industry agreement. New stations also are concerned that they will be unable to qualify for cable carriage if the agreement is adopted. Some of these commenters argue that they will be hurt by the provisions of the industry agreement that place a cap on the maximum number of must carry signals and that exempt small systems from such requirements altogether. A number of these parties propose modifications to the industry agreement or propose their own must carry requirements to guarantee greater access for stations that appeal to smaller audiences. Among these is a proposal by the National Coalition for Minority Broadcasters (NCMB) that would require carriage of all religious, minority, specialty, and public broadcasting stations in addition to all nonduplicated commercial broadcast Stations. WNJU-TV Broadcasting Corporation believes that at least

one channel should be reserved for a specialty station. MPAA and several other commenters recommend that the small system exemption be lowered to include only truly saturated systems, i.e., those with 12 channels or less. The Grant Broadcasting System and several other suggest requirements for carriage of all new stations for a specified period of time ranging from two to five years similar to several of the proposals submitted in response to the *Notice*. Allen Broadcasting proposes that the cap on the maximum number of required must carry signals be raised or eliminated.

102. These interests also are concerned that the viewing standard will limit their ability to qualify for must carry rights. Several commenters propose alternatives to the proposed viewing standard. Allen Broadcasting contends that new stations should be carried from their commencement of operation until survey data for the first full television survey season are available, irrespective of the limits on must carry signals. The City of Boston proposes that the viewing standard be eliminated for public broadcasting and minority stations.

103. The industry agreement is also opposed by several network affiliates that are licensed to small markets that are near large markets. These stations believe that they will be denied carriage under the industry agreement because cable systems will prefer to carry the affiliates from the nearby larger market. They state that the provision in the industry agreement that exempts systems from carrying duplicating network affiliates ignores the fact that affiliation with the same network does not necessarily mean that there is an excessive amount of duplicated programming. These affiliates also submit that the exemption from must carry requirements for systems with 20 or less channels disproportionately affects small market signals because a high percentage of these systems are in markets ranked below 100.

104. The second issue addressed in the *Order* was the extent to which the agreement successfully addresses the relevant constitutional concerns raised in the *Quincy* decision. Supporters of the industry agreement contend that it is constitutional under the test applied in *Quincy* and is responsive to the court's concerns. They assert that it strikes a proper balance between the First Amendment rights of broadcaster and cable operators and that it also recognizes the interests of cable subscribers and programmers. These parties state that the Commission now has a sufficient record to support the adoption of these must carry rules.

105. According to its supporters, the industry agreement is narrowly tailored to preserve cable operators' editorial discretion and also to protect the goal of localism by ensuring the availability of a modicum of local television service. They argue that this proposal does not coerce the speech of cable operators. In this respect, they point out that it allows cable operators to select the qualified television stations they wish to carry when the number of qualified stations is greater than the number of channels set aside for must carry signals. In addition, they note that under the industry agreement, no mandatory carriage requirements are imposed on operators of small systems. They further argue that in any event, no cable system will be required to allocate more than one third of its channel capacity to must carry signals, and in most cases no more than twenty-five percent. Supporters argue that through these provisions the agreement is also responsive to the concern that cable programmers be afforded access to cable subscribers. These commenters contend that the industry proposal also gives consideration to the preferences of cable viewers since the viewership standard serves as a surrogate measure of viewer demand for a given station. Finally, they submit that by not requiring carriage of duplicative stations, channel capacity bgcomes available for nonbroadcast cable services desired by subscribers.

106. Many opposing commenters do not believe that the industry agreement is responsive to the court's concerns. These parties include some who argue for must carry rules, and others who oppose any mandatory carriage requirements. Many parties, especially those whose stations would not qualify for carriage if this proposal were adopted, argue that the proposed rules are not narrow enough because they protect established broadcasters, rather than those whose economic well-being is most at risk. Several of these commenters criticize the viewing standard. They argue that it discriminates against stations with the greatest public interest need for protection. Many view the proposed rules as less burdensome on cable operators' First Amendment rights than the old rules. However, they comment that the rules proposed in the industry agreement still infringe on these rights by restricting cable operators' programming decisions. These opposing commenters contend that the requirement that cable operators devote a specified number of channels to must carry signals is an intrusion on their editorial discretion because it precludes their carriage of other services. They argue that the industry agreement favors one class of speaker, broadcasters, over cable operators and cable programmers. Finally, some commenters contend that the constitutionality of these or any other must carry rules cannot be demonstrated because any mandatory carriage requirements would impose unnecessary restrictions on cable operators' First Amendment rights.

107. We turn next to the question of how well the industry agreement would serve the federal policy interests in the must carry matter. A substantial number of broadcast commenters believe that must carry rules are needed to sustain the important governmental interest in localism. However, some of these commenters do not agree that the industry agreement is the appropriate policy for the preservation of local television service. As was indicated above, several classes of broadcast stations fear that they would not qualify for carriage under the agreement and

their ability to serve the public through local television service would be severely curtailed.

108. Proponents of the industry agreement assert that it is consistent with the statutory framework of the Communications Act and would promote diversity of media voices and viewpoints in local television markets. They state that the industry agreement would assure that viewers will continue to have local signals available to them and that local stations will continue to be able to reach the communities they are licensed and required to serve. In their view, the industry agreement is intended to accomplish this end without unnecessary regulation, as is reflected in the market forces that would be the basis for qualification for carriage. They submit that, in this manner, the industry agreement would result in only minimal intrusion on the First Amendment rights of cable operators while protecting the availability of a modicum of local television service.

109. Parties also comment on other elements of the industry agreement. The first of these concerns is the proposed elimination of the network nonduplication rules. Meridian Communications Corporation, the only nonsigner of the agreement favoring this aspect of the proposal, states that the elimination of these cable rules would give cable operators greater discretion to carry signals of their choice and to avoid the overbreadth problem that the court found in the vacated rules. Several small market broadcasters comment that the elimination of this protection is likely to harm them. They state that the nonduplication rules have important benefits, foster localism, and are in the public interest. They claim that without these rules a few large market stations would be able to dominate smaller market affiliates, especially in the West. They also point out that the nonduplication rules were not invalidated by the *Quincy* decision and have no impact on cable operators First Amendment rights. These parties argue further that repeal of the network nonduplication rules is

beyond the scope of the *Notice* and a further rule making proceeding would have to be initiated if such action is contemplated.

110. The industry proposal also prohibits a cable system from accepting any payment for the carriage of a qualified broadcast signal except to defray copyright costs or costs associated with the delivery of a good quality signal. The Nineteen Cable Operators oppose this blanket prohibition against charging for cable carriage, especially for former must carry signals that would no longer qualify. They state that cable access is a valuable commodity which should be allocated according to the demands of free market forces to the greatest extent possible. Further, they believe that this ban goes against the leased access provisions of Section 612 of the Cable Act. Tribune supports the ban on payment since there is a possibility that cable operators would abuse their monopoly position in the marketplace and essentially create a system that assures must carry rights only for the rich.

111. The industry proposal does not require cable systems to carry any transmissions on the vertical blanking interval, such as teletext, or any other signal enhancements, including multichannel sound (MTS). Those commenting on this issue state that any must carry rules should not unconditionally permit a cable operator to strip these portions of the broadcast signals which are intended for all viewers. Additionally, CBS comments that the industry agreement, if adopted, should be amended to require on-channel carriage for viewer convenience.

112. Senator John C. Danforth, in his July 22, 1986, letter submits a proposal intended to follow the basic outline of the industry agreement. Senator Danforth's proposal differs from the industry agreement in several key respects. First, it would require that must carry rules apply only to cable systems that have no direct competition in the franchise area (i.e., "monopoly" cable systems) re-

gardless of channel capacity (i.e., must carry obligations apply to systems with fewer than 21 channels). Second, the proposal provides that cable systems subject to the rules would be required to devote one-third (33 percent) of their activated channel capacity to carriage of qualified local television stations, and to reserve one-quarter (25 percent) of their set-aside capacity for carriage of public television stations. Third, The proposal maintains the 50-mile zone/viewing standard test for determining commercial stations that qualify for must carry status, but would permit audience measurements to be conducted in noncable, cable, or all television homes, at the option of the local station.[77] Also, it would exempt public stations and commercial stations that have been on the air less than twelve months from the viewing standard, and would make eligible for mandatory carriage translators of public stations.[78]

113. Senator Danforth's proposal also includes several recommendations that concern subjects not addressed in the industry agreement. It would require cable systems to provide A/B switches, by sale or lease, upon request of the subscriber and would implement a narrowly applied waiver procedure for cable systems and local stations. The Senator also suggests that following implementation of must carry rules, the Commission monitor market developments, periodically report its findings to Congress, and

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[77] According to Senator Danforth, permitting local stations to choose the method of audience measurement would minimize the ability of cable systems to drop stations that have significant viewing shares in cable homes, but have insignificant shares in noncable homes due to reception difficulties.

[78] Like the industry agreement, this proposal would not require carriage of duplicated public stations. A station would be considered nonduplicated if 50 percent or less of its average program week consists of the broadcasting of the same episode of a program by another local station within the same week, comparing schedules of the stations for the same seven day period, sign-on to sign-off.

from time to time reexamine the rules to determine whether changes are needed.

## DISCUSSION

### The Federal Interest

114. In recent years, there have been significant changes in the system for providing television service in the United States, particularly with respect to the role of cable television. As commenting cable interests and the court discuss, the cable industry has continued the process of developing new program services and sources that we observed in the *Economic Inquiry Report*. Through this process, the cable industry has evolved from a mere supplemental provider of programming to become more of a direct competitor with the broadcast television industry. In this respect, cable systems currently are the predominant means of distributing satellite-delivered program networks and premium program services to consumers.[79] Moreover, as indicated in the comments, many cable systems are now providing locally originated programming services. We further recognize that some systems are selling time to advertisers on non-broadcast program channels in order to generate revenue. Thus, the cable industry is now a full-fledged video service providing consumers with alternative programming choices that are competitive with the services of broadcast stations. In offering alternative program services to their subscribers, cable operators now function as independent media voices exercising broad editorial control over content.

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[79] Satellite program services have increased rapidly since the development of satellite distribution technology. Today, at least 57 video, 11 text, and 11 audio channel satellite-delivered program services are operating. National Cable Television Association, *Satellite Services Report*, February 1986. The most widely available satellite programming services, Such as CNN, CBN Cable Network, ESPN, SIN Television Network, and USA Network, reach at least 30 million television households each. *Cablevision*, March 31, 1986, at 40.

115. In considering the federal interest in this matter, we observe that our statutory mandate under Sections 151 and 303(g) of the Communications Act is "to make available, so far as possible, to all the people of the United States, a rapid, efficient radio communications service" and "generally encourage the larger, more effective use of radio in the public interest."[80] In furtherance of this statutory mandate, we have consistently pursued policies intended to develop a nationwide television system that maximizes diversity and choice in television services. In recent years, the expansion of cable systems' channel capacity has provided the means for distributing a significantly increased number of program services to viewer households. This additional program delivery capacity has provided opportunities for new program services to develop. In particular, the increased channel capacity of cable systems has made possible the development of satellite-delivered cable networks and premium channels. We find that the introduction of these satellite services distributed by cable systems, and the expansion of cable service as a whole, is fully consistent with the traditional governmental interest in maximizing the choices of television programming available to viewers.

116. Our objective to maximize the program choices available to consumers, particularly through cable services, is now specifically part of our statutory mandate in the Communications Act. In this respect, Congress determined that diversity and competition should be the fundamental underpinnings of federal, state and local government regulation of cable services. This Congressional recognition of our policies, which is set forth in Section 601 of the Cable Act, endorses policies designed to ensure that "cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" and to "promote competition in cable

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[80] 47 U.S.C. §§ 151 and 303(g).

communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[81] The Congress has also expressed, in Section 307(b) of the Communications Act, its will that broadcasting signals be distributed "among the several states and communities" in a fair and equitable manner. The plan the Commission is adopting, as set forth below, contributes toward both statutory goals.

117. We also observe that the federal interest in ensuring access to program choices includes ensuring access to the service of noncommercial educational television stations. During the interim period under the new rules, we find that a particular rule provision for carriage of noncommercial stations is justified. In this respect, both Congress and the Commission have sought to establish a form of television service that is not subject to the same market forces as commercial broadcast and cable television. For example, in the *Sixth Report and Order on Television Assignments*, Docket Nos. 8736 and 8975, 41 FCC 148, the Commission recognized that noncommercial stations could not compete effectively with commercial stations and so reserved 242 television channels for noncommercial use.[82] Similarly, in enacting the Educational Facilities Act of 1962,[83] Congress provided funds for noncommercial television stations. Congress further affirmed and strengthened the goal of extending noncommercial television when it enacted the Public Broadcasting Act of 1967.[84] There-

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[81] 47 U.S.C. §521.

[82] *See Sixth Report and Order on Television Assignments*, Docket Nos. 8736 and 8975, adopted April 11, 1952, 41 FCC 148.

[83] *See* Pub. L. No. 87-447, 76 Stat. 64 (1962); *see also* 47 U.S.C. §§396(a)(5) and (6).

[84] *See Pub. L. No. 90-129, 81 Stat. 365 (1967); see also* 47 U.S.C. §§396(a)(5) and (6). Congress affirmed and strengthened the goal of extending public television to as many people as possible in the Public Broadcasting Act of 1967. There, Congress stated that "it furthers the

fore, in order to ensure continued access to noncommercial television service during the interim period for consumers to gain the awareness and capability to receive television signals independently off-the-air, particular provisions of the interim regulatory plan described below pertain to the carriage of noncommercial stations. As with our general rules, we do not believe that signal carriage obligations for noncommercial stations beyond the interim period established today are warranted, given the input selector switch rules and consumer education program established herein.

118. In considering the must carry matter, we find that there are substantial and significant federal interests with respect to maximizing the video programming choices available to consumers. We find that these interests are of sufficient importance that they merit regulatory intervention to ensure viewer access to the maximum number of program choices available through cable and off-the-air broadcast television facilities. However, we recognize that regulations designed to ensure access to program choices also are likely to be intrusive on cable operators' editorial discretion and, therefore, we believe that any such regulations should be limited in both scope and duration to the minimum necessary to achieve the preservation of this access.

119. We observe that our assessment of the federal interest is premised on concerns that differ from those propounded by some of the supporters of the industry agreement; this assessment of the federal interest also is different from that relied upon by the Commission, i.e.

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general welfare to encourage public broadcasting services," and that "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will effectively make public broadcasting services available to all of the citizens of the United States" *See* Pub. L. No. 90-129, 81 Stat. 365 (1967); *see also* 47 U.S.C. §§396(a)(5) and (6).

Section 307(b), in initially adopting the former must carry rules.[85] However, after considering the changed structure of the overall video market resulting primarily from the emergence of the cable industry as a means for distributing new program services, we conclude that it is no longer appropriate or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television service from competition with cable service.[86] In this respect, we believe the public interest would be better served by a policy that maximizes program choices, rather than one that that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers. In general, we believe that it would not serve the interests of video consumers to maintain policies that favor any group of program service providers to the exclusion of other competing service providers, especially where such policies may hinder consumers' access to those competing program services. Our policy decision, as set forth below, is, therefore, designed to maximize the availability of program choices by competing providers both off-the-air and on cable.

120. We also are concerned that the First Amendment rights of cable operators not be abridged. In their earliest stage of development, cable systems served exclusively as passive retransmitters of broadcast signals. As cable systems have expanded their services to include programming from other sources, the editorial role of cable operators has grown accordingly. This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media. Like the *Quincy* court, we recognize that concomitant with the expanding role of

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[85] This is not to say that the regulatory plan we are adopting does not have the ancillary effect of furthering some of those interests, e.g., Section 307(b).

[86] *See First Report and Order, supra,* at 699.

cable systems in providing program services is the expansion of cable operators' editorial discretion which is protected by the First Amendment.[87] Thus, any regulations we may consider in furtherance of our maximizing programming choices and competition goals must be weighed in terms of their impact on cable operators' and cable programmers' First Amendment rights.

**The Need for Regulation**

121. The central issue in the must carry matter is the perception that cable systems may be able to preclude access by their subscribers to off-the-air broadcast signals. This perception derives not form any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their basic cable service. This expectation is a direct result of the former must carry rules, which, in fact, required cable systems to carry all available off-the-air broadcast television signals. The expectation that local broadcast signals will be carried by their cable system has caused many subscribers to perceive that there is no need to install or maintain the capability to receive broadcast signals off-the-air. Cable operators have evidently encouraged this view. However, the technology of cable service does not necessarily preclude the use of antennas and other equipment for independent off-the-air reception of television signals.

122. Therefore, as evidenced by data discussed below, when consumers subscribe to cable service, they tend to

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[87] *See Quincy, supra* at 1453. In recent years, lower federal courts have also recognized that cable operators engage in activities protected by the First Amendment and some have subjected our cable rules to more rigorous First Amendment analysis. *See e.g., Tele - Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-1057 (8th Cir. 1978), *aff'd* on other grounds, 440 U.S. 680 (1979).

disconnect, and in most cases dismantle, antennas used with existing receivers. From the data it is also apparent that where cable subscribers connect new state-of-the-art television receivers to cable service, they often also do not connect those receivers to antennas. In addition, under the former must carry rules, most cable subscribers were unfamiliar with, and indeed had no reason to be familiar with, an input selector device for choosing between cable and off-the-air broadcast service. As a result, most cable subscribers have come to perceive that their only means of access to off-the-air signals is through their cable service. This has led to the perception that cable has the power to function as a gatekeeper, determining which local broadcast signals will be available to the cable subscriber. Thus, we recognize that our former must carry rules have created a misperception on the part of cable subscribers which needs to be corrected before economic forces can be relied upon to achieve maximum diversity in program choices for the public.

123. Our review of the cable industry indicates that its development has progressed such that cable is now becoming a major factor nationwide. As shown on Table 1, cable service is now available to 76 percent of the television households nationwide and cable subscribership is now 47 percent nationwide. This contrasts with levels of homes passed and cable penetration of 44 percent and 19 percent respectively in 1979, when we last examined the economic relationship between cable and broadcast television. It also is expected that cable will continue to expand in the future. According to a recent study by Arthur D. Little, Inc., the number of cable households will increase to 48 million by 1990. Using International Communications Research's estimate that there will be 94 million TV households in 1990, this translates to 51 percent cable penetration by 1990. Table 2 shows that cable penetration is highest in smaller markets and that this pattern has re-

mained relatively stable over time and with increasing levels of cable penetration nationwide.

124. As revealed by the ELRA study submitted by NAB, it is plain that cable subscribers now generally have not installed or maintained the antennas and associated equipment necessary for satisfactory reception of broadcast signals off-the-air. In addition, other research indicates that the increased cable penetration in recent years has been accompanied by a decline in dependence on antennas for reception of television signals. This phenomenon is evidenced by the data in Table 3, which indicates decreases in the number of outdoor and indoor antenna sales of 35 percent and 26 percent respectively. While sales of antennas are declining, sales of cable-ready television receives that are intended primarily for use with cable service have tripled in the same period and now comprise 58 percent of the total TV receivers sold. Cable-ready television receiver growth is shown on Table 4.

125. From the above, it is plain that cable systems have sufficient reach to affect almost one-half of the potential audience for broadcast television service in communities nationwide, and that this reach is even greater in smaller markets. Also, the available information on antenna use and sales indicates that cable subscribers in general currently do not have the antennas in place to provide satisfactory reception of off-the-air broadcast stations that are not carried on their cable systems. Further, the data on TV receiver sales show that cable-ready sets now command more than one-half of the market and that the market for these receivers appears to be continuing to grow. We believe this information demonstrates a trend away from reliance on off-the-air reception of television signals. Thus, we find that the current misperceptions by subscribers and their resulting behavior, coupled with the growth of cable service nationwide, have produced the result that cable television systems have a perceived ability to affect access to broadcast television service by a substantial portion of

the population. We believe this perceived ability is likely to persist in the absence of a shift in subscriber awareness and practices with respect to maintenance of effective off-the-air reception capability.

126. Because cable subscribers have not perceived the need to maintain or install antennas and input selector switches, their access to off-the-air broadcast signals is limited to those carried by the cable system to which they subscribe. If We did not adopt interim must carry rules now, until our long-term regulatory plan to educate consumers on the need for independent access to off-the-air signals and to make input selector switches available takes hold, harm to The public interest would ensue. Subscribers would be disadvantaged by not being able to view broadcast signals dropped by their cable system. This harm would result even though cable systems do not create a barrier *per se* to use of antennas for receiving broadcast signals off-the-air. In this respect, the UHF antenna terminals of most currently used television receiver are not affected by connection of cable service, and the VHF antenna terminal can be used for off-the-air reception if the cable service is connected through an input selector switch.[88] Thus, it is subscribers' current misperception that it is not necessary to have direct off-the-air access to broadcast signals that impedes the ability of broadcast stations that are not carried on cable systems to compete for the attention of cable subscribers.

127. As indicated above, we believe that competitive market mechanisms generally are the most appropriate method for assuring that the interests of consumers are satisfied. In the instant case, the increased competition

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[88] Cable ready receivers generally disable the UHF antenna terminals when used in the cable ready mode. Use of UHF antennas with such receivers would require the viewer to use the mode switch on the receiver to alternate between cable service and off-the-air UHF reception.

resulting from the emergence of independent cable programming benefits the public by providing additional viewing choices and by leading broadcasters, cable operators, and cable programmers to be more attentive to viewers' program interests and preferences. Competition, coupled with the additional program channels typically provided by cable systems, also helps promote the availability of a greater variety of programming from diverse sources. In this regard, an open, competitive market where there is potential for access by all suppliers of video program services should operate to provide the mix of programming and viewing choices that most effectively meets public demand. In addition, a competitive market would ensure that television services and facilities are provided at the lowest cost to all parties. We further note that a competitive market would promote these desirable industry performance results without governmental regulatory intervention.

128. We also recognize that a competitive market may not lead cable operators to carry all of the television signals that can be received off-the-air in their communities. But such a result furthers the public interest if cable systems are able to replace an off-the-air signal with a signal from another source for which their subscribers would have a greater preference. Moreover, so long as cable subscribers are aware that they can receive the signal off-the-air, their overall program choices are maximized. While cable systems and broadcast stations compete directly in many respects, they are also complementary in others and it is clear from the record that cable systems do have incentives to carry broadcast stations. Thus, in cases where a cable system chooses not to carry a particular broadcast station, it does not necessarily indicate a public harm, but may simply reflect the fact that there is not sufficient demand for the station by the system's subscribers to warrant carriage. This is particularly likely to be the case for limited channel capacity systems where there are strong

incentives to use the available channels for the most popular programming.

129. In this regard, we recognize that other program sources, such as the many satellite networks, make strong contributions toward satisfying the informational and entertainment needs of the public. We further observe that "cable satellite programming" as defined in Section 705 of the Cable Communications Policy Act of 1984,[89] is an important source of programming for many noncable subscribers, particularly in rural areas, through home satellite dish (HSD) facilities.[90] In view of the fact that satellite programmers' current primary means of access to viewers is through cable systems, the public's interest in satellite cable programming warrants recognition in our decision making process n the must carry matter.

130. An environment where consumers have maximum access to the available viewing choices, which our two-part regulatory program is designed to achieve, also contributes to the furtherance of the goals under our traditional interpretation of Section 307(b) of the Communications Act that television signals be distributed ". . . among the several States and communities." in a fair and equitable manner.[91] In this regard, we believe that the additional program sources that have flourished during the cable industry's

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[89] 47 U.S.C. §705.

[90] Since the Commission deregulated receive-only earth stations in 1979, sales of HSDs have risen dramatically. An industry source indicates that 1,345,000 HSDs were in use by the end of 1985, representing 1.6 percent of television households in the United States. First Communications Group, *The Home Satellite State of the Industry Report, January, 1986, at 7, 15.* The HSD industry is currently facing a period of some uncertainty as many satellite programmers are implementing scrambling systems. The future of this industry and the ability of noncable subscribers to access satellite programming will depend in large part on the decisions of these programmers with respect to marketing their scrambled services.

[91] 47 U.S.C. §307(b).

growth, in particular the many satellite networks, contribute to this goal.

131. There is only limited direct evidence available concerning the behavior of cable systems in the absence of must carry regulation and the effects of such behavior on their subscribers' program choices. While cable systems generally have continued to carry those stations that are available off-the-air in their communities in the period since the *Quincy* decision, there is evidence in the record that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations. In this regard, the reports of the experiences of commercial and noncommercial stations with respect to carriage by cable systems, coupled with the information on cable subscribers' practices with respect to maintaining independent off-the-air reception capability, indicates that some cable subscribers currently may not have access to all of the broadcast signals available in their area. In considering the evidence of cable industry behavior in the absence of must carry rules, we are also aware that many cable operators thus far may have been hesitant to act as if there were no such rules in view of the appeal by the NAB and others of the *Quincy* decision and our pending rule making in this matter (and NCTA leaders have apparently suggested to members that they continue to carry local signals until this matter is settled).

132. We find the FTC study of SMATV signal carriage practices to be somewhat instructive in that, to the extent that SMATV systems and the economic environments in which they operate resemble the cable industry, it provides indication that economic forces are not likely to lead cable systems to carry all of the broadcast signals available off-the-air in their local communities and that the number of broadcast signals carried by cable systems operating in an unregulated environment is likely to be influenced by the availability of other program services. However, this study

does not provide any definitive information about cable signal carriage practices in the absence of must carry rule or the effects of such practices on cable subscribers' access to the available off-the-air broadcast signals.

133. In summary, we find that the current practices of consumers with respect to connecting their television sets to cable systems has led to the perception that cable operators have the ability to limit their subscribers' access to broadcast television signals. This misperception is inimical to the public interest in that it tends to frustrate our federal objectives of maximizing program choices and promoting a fair and open competitive market environment that will produce programming that meets viewers' interests and preferences. The rapidly evolving cable industry with its changing economic incentives makes it difficult to provide an accurate forecast of the effects of the signal carriage practices of cable systems in the absence of must carry rules on viewer access to program choices. What is clear, however, is that a substantial number of cable subscribers have not maintained independent off-the-air reception capability. As a result, many subscribers currently would not be able to view those broadcast signals not carried by cable systems. We also find that there is ample evidence that cable penetration nationwide has reached a level where there is potential for this problem to affect a substantial portion of the population.

134. Thus, we conclude that some form of regulation is necessary to correct these undesired effects of our former rules in order to prevent them from further hindering the achievement of our federal objectives concerning cable and broadcast television service. Such regulation must be designed to give viewers the capability to preserve and reestablish their independent access to the available off-the-air program choices and to promote a competitive industry structure that will foster the development of new program choices. In addition, any regulation must achieve these objectives in a manner that will be least intrusive on the

First Amendment rights of cable operators and cable programmers.

**TABLE 1**

**Growth of the Broadcast and Cable Industries**

| | 1972 | 1975 | 1979 | 1983 | 1986 |
|---|---|---|---|---|---|
| TV Households (millions) | 65 | 70 | 75 | 83 | 86 |
| Total TV Stations | 905 | 958 | 992 | 1095 | 1206 |
| Commercial TV Stations | 699 | 711 | 732 | 802 | 898 |
| Affiliates | 607 | 625 | 620 | 623 | 628 |
| VHF | 476 | 483 | 485 | 501 | 485 |
| UHF | 131 | 142 | 135 | 122 | 143 |
| Independents | 92 | 86 | 112 | 179 | 270 |
| VHF | 34 | 30 | 31 | 25 | 39 |
| UHF | 58 | 56 | 81 | 154 | 231 |
| Noncommercial TV Stations | 206 | 247 | 260 | 293 | 308 |
| VHF | 89 | 95 | 102 | 114 | 117 |
| UHF | 117 | 152 | 158 | 179 | 191 |
| Cable Television | | | | | |
| No. of Systems | 2841 | 3506 | 4150 | 4825 | 6844 |
| Homes Passed (millions) | 11 | 20 | 33 | 45 | 65 |
| Homes Passed (%) | 17 | 29 | 44 | 54 | 76 |
| Basic Subs. (millions) | 6 | 9.8 | 14 | 28 | 40 |
| Penetration (1%) | 9 | 14 | 19 | 34 | 47 |
| Pay Subs. (millions) | 0 | 0.5 | 5 | 23 | 22 |

*Sources:* Television Digest's *Television Factbook;* Broadcasting's *Yearbook;* Arbitron's *Markets and Rankings Guide; Cablevision,* April 11, 1983, at 69; *Cablevision,* February 10, 1986, at 56; *Television & Cable Factbook,* Handy Pocket Directory of Television Stations in Operation, March 1985; and *1986 Cablefile.*

Cable Television

## TABLE 2

### Cable Penetration By Market Rank

| Market Rankings | 1972 | 1976 | 1980 | 1984 |
|---|---|---|---|---|
| All Markets | 10.8 | 15.1 | 22.1 | 43.0 |
| 1 - 25 | 7.4 | 10.2 | 15.7 | 36.5 |
| 26 - 50 | 9.4 | 15.5 | 22.9 | 46.4 |
| 51 - 100 | 11.9 | 17.5 | 26.2 | 48.0 |
| 101 - 150 | 20.6 | 24.8 | 33.9 | 52.5 |
| 151 - end | 33.9 | 40.3 | 47.6 | 59.3 |
| 1 - 10 | 8.4 | 10.6 | 14.0 | 33.6 |
| 11 - 20 | 8.5 | 10.2 | 14.2 | 37.5 |
| 21 - 30 | 5.0 | 12.2 | 20.0 | 42.7 |
| 31 - 40 | 7.2 | 10.8 | 19.0 | 44.0 |
| 41 - 50 | 13.0 | 20.5 | 29.2 | 49.5 |
| 51 - 60 | 9.2 | 15.5 | 23.1 | 47.8 |
| 61 - 70 | 11.4 | 11.7 | 21.5 | 47.6 |
| 71 - 80 | 9.5 | 21.5 | 30.3 | 50.9 |
| 81 - 90 | 9.0 | 18.6 | 26.8 | 46.0 |
| 91 - 100 | 17.8 | 20.0 | 29.5 | 47.6 |
| 101 - 110 | 11.7 | 22.4 | 27.1 | 48.2 |
| 111 - 120 | 16.0 | 20.4 | 40.8 | 55.5 |
| 121 - 130 | 20.1 | 26.6 | 33.2 | 53.9 |
| 131 - 140 | 19.7 | 23.3 | 31.3 | 48.2 |
| 141 - 150 | 30.7 | 31.4 | 37.1 | 56.7 |
| 151 - 160 | 28.3 | 38.9 | 47.0 | 53.7 |
| 161 - 170 | 29.1 | 32.9 | 37.6 | 56.2 |
| 171 - 180 | 32.6 | 34.4 | 45.1 | 57.0 |
| 181 - 190 | 35.7 | 44.0 | 52.9 | 66.0 |
| 191 - 200 | 42.3 | 47.5 | 53.3 | 65.2 |
| 201 - end | 35.3 | 44.9 | 49.2 | 57.9 |

Sources: Arbitron's *1972 Television Market Analysis, Television Markets and Rankings Guide 1976 1977, 1980 1981 Television Markets and Rankings Guide,* and *1984 1985 ADI Market Guide.*

**TABLE 3**

| | Indoor Antennas | | Outdoor Antennas | |
|---|---|---|---|---|
| | Units | Dollars | Units | Dollars |
| | (thousand) | | (thousands) | |
| 1980 | 3,141 | 19,624 | 2,318 | 45,136 |
| 1981 | 3,405 | 21,751 | 2,218 | 44,597 |
| 1982 | 2,917 | 20,904 | 1,964 | 41,123 |
| 1983 | 2,319 | 15,596 | 1,945 | 41,768 |
| 1984 | 2,035 | 13,565 | 1,709 | 37,518 |

Source: EIA, *The Electronic Market Data Book*, 1981 through 1985 editions, Table 5-19 (data from "TV and FM Accessory Parts," Report No. MS429). "Indoor antenna" is defined as an antenna capable of receiving VHF, UHF or a combination of VHF and UHF television signals and not an integral part of a TV receiver. Such antenna is designed to mount on the top, back or side of a TV receiver. An "outdoor antenna" is defined in the same manner except that it is specified as designed for outdoor mounting.

**TABLE 4**

**Sales of Cable Compatible TV Sets**

| | Number of Color TV Units | Percent of Total TV Sales |
|---|---|---|
| 1981 | 3,896,534 | 33.1% |
| 1982 | 5,181,645 | 44.4 |
| 1983 | 6,568,843 | 45.9 |
| 1984 | 9,621,471 | 58.1 |

Source: EIA. *The Electronic Market Data Book*, 1985, Table 1-8, at 12.

**Policy Decision**

135. In view of the above, we have determined that the most appropriate course of action is to adopt a plan that will make cable subscribers aware of the need for the capability to access broadcast signals directly off-the-air and will actively assist the development of such capability. Such an approach is consistent with our general belief that market mechanisms are the preferred method for ensuring that the interests of consumers are satisfied. We also recognize that our former must carry rules have contributed to the creation of a distorted market environment which needs to be corrected before economic forces can be relied upon to achieve maximum diversity in program choices for the public. In view of the fact that most cable subscribers now are unaware of the need to receive broadcast signals off-the-air and are unprepared to do so, it is likely to take a considerable period of time to educate them with respect to the need for direct access to broadcast services and to allow them sufficient opportunity to acquire such capability or to make an informed choice that such a capability is not desired. Thus, we believe that in the short-term. It is necessary to adopt an approach that also will ensure that viewers continue to maintain access to broadcasting, so that it remains a competitive alternative source of programming even as consumers move toward an environment without must carry rules.

136. To implement this course of action, we have developed a two-part regulatory program which is designed first to alter existing practices and knowledge with respect to connection of cable service that can render cable subscribers unable to receive broadcast television service and, second, to provide interim must carry protection to the broadcast television industry during the transition to the new environment in which the connection of cable service no longer has that effect. Under the first part of our new

regulatory program, we will require cable systems to provide their subscribers with input selector switches that will enable reception of broadcast signals by means of an antenna. In addition, we will require cable systems to implement a consumer education program to inform their subscribers of the purpose, and need for, maintaining off-the-air reception capability after subscribing to cable. The second part of our program provides for interim must carry rules that will expire at the end of a five-year period. The transitional must carry rules we are adopting are comprised in large part of the terms of the industry agreement, with certain modifications to ensure that the rules maximize the public interest. The modifications to the industries' proposals include specific protections for noncommercial stations operating on reserved channels and new commercial stations and to maintain our existing nonduplication rules.

137. We believe a five-year transition period will provide sufficient time for consumers to become aware of the need for direct off-the-air access to broadcast signals and to acquire such capability if they so desire. Accordingly, the interim must carry rules and certain aspects of the input selector requirements as discussed below will expire on January 15, 1992. We plan to initiate and conclude a rule making proceeding sufficiently prior to this expiration date to determine whether there are particular situations where mandatory carriage rules might continue to be necessary.

138. We emphasize that it is out of an abundance of caution and concern for the significant governmental interest in maximizing diversity in consumers' program choices that we are imposing must carry rules until it can be assured that there has been sufficient opportunity for cable subscribers to reestablish independent access to broadcast service.[92] In this respect, we recognize must

[92] In this regard, the interim must carry regulations are not intended as a mechanism to extend signals beyond a station's service contour

carry rules are a stringent form of regulation that intrude on cable operators' free speech rights. Although we have found that consumers would have difficulty receiving off-the-air signals at present, the part of our regulatory plan pertaining to input selector switches and consumer education is expected to resolve this problem. Accordingly, we find no need or justification in this proceeding for imposing must carry requirements for more than a five year period. We conclude that must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers. While we have found that short-term must carry regulations are necessary in order to ensure that broadcasting remains a competitive alternative source of programming in the interim period, the record clearly supports no more extensive regulatory program than that which we are adopting. In this respect, the transitional rules are no broader or more extensive than necessary to provide an orderly shift to a less regulated environment. The interim must carry rules are considerably narrower in scope than those vacated in *Quincy* and are specifically tailored to the need for regulation. Thus, we believe they meet the constitutional concerns expressed by the court. We note that the interim rules are less intrusive on cable operators' editorial discretion than the former rules in that they will apply only for a specific limited period of time.

139. We are confident that, in the long run, this plan will ensure viewers' access to broadcast signals off-the-air and, thus, the greatest viewer choice should be maintained. However, in order to achieve the policy objectives we have set forth herein, it is essential that all of the major features of this program, in particular, the input selector

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or into areas where the signal would not otherwise be available off-the-air.

switch, education program, and interim rules with firm expiration date, be implemented! If any of these articulated elements were to be deleted? the remaining portions of the program might not be sufficient to achieve our objectives.

### Description of the New Rules

## I. Input Selector Switch Rules

140. The new rules for developing and maintaining the capability of cable subscribers to receive broadcast signals off-the-air require that cable operators offer to install an input selector switch for use with an antenna at no additional cost for all new cable subscribers, Thereby leaving the subscriber in the same position to receive off-the-air signals as before cable installation.[93] This is a continuing requirement that will not expire at the end of the transition period. The new rules also require cable operators to offer existing subscribers an input selector switch at no cost, by providing all such subscribers with a form that is to be returned by those who desire a switch. On that form, an existing subscriber will select the option of either receiving the switch with self-installation instructions or, alternately, requesting that the cable operator install the switch, in which case the subscriber can be charged reasonable labor costs. This offer shall be made by the cable operator in writing within six months of the effective date of this *Order* and on an annual basis thereafter for five years. There is no continuing requirement for cable operators to offer input selector switches to existing subscribers after the conclusion of the five-year transition period. In other respects, the rules concerning input selector switches apply identically to both existing and new subscribers. First, the switch must be provided to all cable subscribers, whether or not the cable system carries all

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[93] *See* Appendix B.

local television broadcast signals.[94] Second, as described in further detail below, the operator must provide information to the subscriber concerning the function of the switch. Third, in all instances, cable operators must offer to supply and install an input selector switch for each separate television set to which the cable is connected.[95] Fourth, cable operators will be required to inform subscribers that an antenna may be needed to receive television broadcast signals. Fifth, cable operators will not be permitted to suggest or recommend that subscribers dismantle their antennas.

141. In addition, the new rules will impose a continuing requirement for cable systems to inform subscribers of the changes in the regulations concerning carriage of broadcast signals and of the need for input selector switches. These rules will require cable operators to inform their subscribers annually that not all signals are required to be carried; that after January 15, 1992, no signals might be carried; and thus that it may be necessary to use an antenna in conjunction with an input selector switch to receive available off-the-air broadcast stations not carried on the cable systems. In addition, cable operators must include a description of the function of an input selector switch and that its purpose is to aid the viewer in preserving independent access to off-the-air television service. Cable operators must also inform the subscribers which local broadcast signals are not at that time carried by the cable system. The information must state further that the input selector switch will assist subscribers in receiving those local stations available off-the-air that may not be

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[94] In cases where the cable subscriber has an equivalent input selector device, for example through a former purchase or as a built-in feature of his/her television receiver, the cable system will not be required to provide another switch.

[95] This requirement is subject to the above exception for cases where subscribers are already equipped with input selector switches.

carried on the system. This consumer education information must be provided to new subscribers at the time of installation of cable service and to existing subscribers that do not have input selector switches within six months after the effective date of this *Order* and Thereafter on an annual basis. The annual requirement may be satisfied by including the information with the annual input selector switch offering, in monthly subscriber billings or other mailings.

142. With respect to the technical performance characteristics of input selector switches, we recognize that there is potential for signals from the cable system to leak into the antenna input terminal if the two signal paths in a switch are not sufficiently isolated. Such undesired signal leakage would be radiated through the antenna and could cause significant interference to licensed radio services and to the operation of other radio frequency devices. In order to prevent such possible interference, all input selector devices installed to provide switching between a cable television system and an antenna for reception of off-the-air broadcast television signals will be required to comply with the technical standards of §15.606(a) of the rules.

## II. Interim Must Carry Rules

143. Under the transitional signal carriage rules we are adopting, cable systems will be required, subject to various conditions, to devote a limited portion of their capacity to carriage of qualified broadcast television signals. A cable system's mandatory carriage obligations under the revised rules will vary according to the number of usable activated channels available on the cable system. "Usable activated channels" are defined as those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies. This definition is the same as that specified in the Cable Act for other areas of cable regu-

lation.[96] Broadcast stations will qualify for carriage under these rules on the basis of several criteria. Any station not qualifying for must carry status may be carried at the cable operator's discretion. However, carriage of such stations will not count towards meeting a cable system's signal carriage obligations under the interim rules.

144. *Qualified Broadcast Stations.* All domestic fullservice broadcast stations will be eligible to qualify for carriage under these rules. Noncommercial educational translators operating at 100 watts or more of power and located in the cable community will also be eligible to qualify for carriage. Broadcast stations licensed by foreign governments, satellite stations, low power television stations, commercial translators, and subscription television stations are not entitled to carriage under the new rules.[97] To qualify for carriage, a commercial or noncommercial broadcast station must be licensed to a community that is within 50 miles of the cable community, as measured from the principal cable headend to the reference point of the station's city of license as defined in Section 76.53 of our rules.[98] In the case of cable systems with multiple headend facilities, the cable operator shall specify which such facility is the principal headend.

145. Commercial broadcast stations also must meet a viewing standard to qualify for mandatory carriage on a cable system. To meet this standard a commercial station must demonstrate that it attains at least an average share of total viewing hours of 2 percent and a net weekly

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[96] *See* 47 U.S.C. §532(b)(5)(A).

[97] Cable carriage of these outlets and any other broadcast stations that do not qualify for carriage under these rules will continue to be permitted at the discretion of the cable operator but will not count towards meeting a cable system's mandatory signal carriage obligations.

[98] *See* 47 CFR §76.53. We also note that there will be no special provisions in the interim must carry rules for hyphenated markets, as defined in Section 76.51 of our rules. *See* 47 CFR §76.51.

circulation of 5 percent in noncable households in the county where the cable system is located.[99] However, a new commercial station will be exempt from demonstrating that it meets this viewing standard for its first 12 months of operation.[100] Additionally, stations that have commenced operation after July 19, 1985, the effective date of the suspension of the former must carry rules, and stations that have commenced operation since that time will not be subject to the viewing standard for one full year from the effective date of the interim rules. Also, no viewing standard will apply to otherwise eligible noncommercial educational stations or translators operating on reserved channels.

146. A commercial broadcast station shall demonstrate that its audience during the required survey period meets the viewing standard on the basis of independent professional audience surveys conducted according to recognized statistical methodology. Audience surveys must be based on her viewing of the subject station in noncable homes in the county where the cable system is located. If the cable system serves homes in more than one county, the appropriate measure will be for the county in which the plurality of subscribers reside. In cases where the generally accepted practice for audience measurement is to report

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[99] "Share of total viewing hours" means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area. These definitions are consistent with those used for determining whether a station is significantly viewed. *See* 47 CFR §76.5(k).

[100] A station's one year exemption from the viewing standard will begin on the date it begins operation under program test authority (PTA). Also, stations that have gone off-the-air and come back on at some time after the first calendar year from their initial commencement of operation will not qualify as new stations for purposes of these rules.

statistics on a split county or independent city basis, these areas will be acceptable as the appropriate geographic unit for the audience survey.[101]

147. Stations that have been on the air for more than one television survey season will qualify for carriage upon showing that they met the viewing standard during the previous Television survey season, television survey season will be defined as the period between April 1 of one year and March 31 of the following year. The showing must be based on four 4-week survey periods, with at least one survey period in each of the 4 quarters of the television survey season (i.e., April-June, July-September, October-December and January-March). The survey methodology must be comparable to that of surveys conducted to demonstrate significantly viewed status pursuant to Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).[102] To the extent that the regularly published reports of the major audience rating services (e.g., Arbitron and A.C. Nielsen) meet these criteria, they may be used to satisfy these requirements. However, a showing that a station meets the viewing standard for a qualified station may be based on audience surveys conducted by any independent professional survey organization.

148. Commercial stations that have been operational for less than a full television survey season, except new sta-

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[101] The rating services occasionally split large counties where there are viewing differences from one part of county to another. Also some cities that are not located in counties are reported separately. Where a station qualifies for carriage based on surveys for a geographic unit other than an entire county, its carriage rights will be limited accordingly.

[102] *See* §76.54(d). The principal difference between the surveys required here and those used to determine significant viewing status is that must carry qualification will be based on four 4-week survey periods instead of three 4-week audience periods.

tions that have been on-the-air less than 12 months, may demonstrate that they meet the viewing standard for qualifying for must carry status on the basis of a special study conducted by an independent professional surveying firm.[103] The study must demonstrate that the subject station meets the viewing standard on the basis of audience surveys covering a period of at least two weeks.[104] The survey must be based only on viewing in noncable homes in the county where the cable system is located. In this respect, we believe it is more appropriate To define qualified signals in terms of those actually available off-the-air and that the viewing patterns of noncable households are likely to provide better indicators of such signals than the alternative approach proposed by Senator Danforth. In order for the Sample to be representative of the viewing in the cable system's country, the distribution of the noncable homes sampled for this showing must be proportional to the noncable population distribution of the appropriate county. The level of viewing in the sample households may be measured using any recognized surveying technique (i.e., diary, telephone, or meter). Further, the sample size shall be sufficient to assure that the average audience statistics reported are at least one standard error above the required viewing level for a qualified station.

149. Additionally, in order to qualify for must carry status a television broadcast station must deliver a "good quality" signal to the principal cable headend. The standard we are adopting requires that such signal equal or exceed a high picture quality in which interference may

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[103] We note that it is possible for a new station to have been on-the-air more than 12 months and less than one complete television survey season.

[104] The required survey is similar to that prescribed in Section 76.54(b) for determining whether a station is significantly viewed. The two procedures differ in that a survey for qualifying for must carry status is a county based, rather than a community based study, and there are no limits on the choice of two-week survey period.

be just perceptible.[105] Because a station's signal is processed at several points throughout a cable system, we believe this level of quality at the headend is necessary to provide enjoyable viewing to cable subscribers. The subjective nature of this standard generally would require that systems carry signals of qualified television broadcast stations that provide a minimum signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processor at the principal cable headend.[106] In general, these levels would be needed to achieve the above picture quality.[107] We recognize that in some instances cable systems currently may not have equipment capable of receiving broadcast signals of the required quality. In such circumstances, a broadcaster would be permitted to furnish any equipment or to compensate a cable operator for equipment necessary to upgrade existing reception capability or to provide direct feed of baseband signals. Broadcast stations also will be permitted to deliver their baseband video/audio signal directly to cable systems via alternative means such as a landline or microwave faciiity.

150. *Signal Carriage Obligations.* The number of qualified broadcast stations a cable system must carry is determined by its number of usable activated channels. Cable television systems with 20 or less usable activated channels only will be required to carry one qualified noncommercial

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[105] This definition is generally comparable to a level 2 grade signal as rated by the TASO Committee. *See* Report of the Television Allocations Study Organization, *Engineering Aspects of Television Allocations.* March 16, 1959, at 448, 453. *See also* Gordon L. Fredendall and William L. Behrend, "Picture Quality—Procedures for Evaluating subjective Effects of Interference," *Proceedings of the IRE.* Vol. 48, No. 6, at 1030-1034.

[106] These values may be considered comparable to the level 2 TASO picture quality standard.

[107] We are not establishing a specific technical requirement to permit greater flexibility among the parties to determine good picture quality.

(1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, 105 S.Ct. at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court has indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* 105 S.Ct. at 3106 n. 14; *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined

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[9] The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the Young exception applies similarly in both cases.

despite the Eleventh Amendment bar. *See Monell, supra,* 436 U.S. at 694, 98 S.Ct. at 2037.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

## III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir.1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman,* 569 F.2d 300, 302 (5th Cir.1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio,* 691 F.2d 1344, 1353 (11th Cir.1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose*

*Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir.1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir.1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing—particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO—is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial

likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, 569 F.2d at 302. *See also University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.1984), *cert.*

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[10] To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir.1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

*denied sub nom. Windrush Partners v. Metro Fair Housing Services*, ___ U.S. ___, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education programs if left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be nonexistent.[11]

Given this finding by the lower court, which is entitled to substantial deference, see *Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court—and this Court on review—to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits,

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[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted—that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimination, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). If, in that event, in sub-

mitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir.1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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**No. 86-7090**

**D.C. Docket No. 83-1676**

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

JOHN F. KNIGHT, JR., et al., individually and on behalf of others similarly situated,
*Plaintiffs-Intervenors, Appellees*
v.

THE STATE OF ALABAMA, GEORGE C. WALLACE, Governor of the State of Alabama; and THE ALBAMA PUBLIC SCHOOL and COLLEGE AUTHORITY; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation,
*Defendants-Appellants,*

JACKSONVILLE STATE UNIVERSITY etc., et al.,
*Defendants.*

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**On Appeal From the United States District Court for the Northern District of Alabama**

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[Filed October 6, 1987]
[Issued as Mandate November 2, 1987]

## JUDGMENT

Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellants, the cost on appeal to be taxed by the Clerk of this Court.

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* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

## APPENDIX F

**Supreme Court of the United States**

**A-506**

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JOHN KNIGHT, et al.,

*Applicants,*

v.

AUBURN UNIVERSITY, et al.,

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entered cause be, and the same is hereby, extended to and including January 19, 1988.

/s/ JOHN PAUL STEVENS
Associate Justice of the Supreme
Court of the United States

Date this 29th
day of December, 1987.

## APPENDIX G

## ARTICLE VI

### Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding.

## APPENDIX H

## AMENDMENT XIV

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## APPENDIX I

### §455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party or the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization

only if the outcome of the proceeding could substantially affect the value of the interest;
(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

No. 87-1200

Supreme Court, U.S.
FILED
MAR 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
# Supreme Court of the United States
October Term, 1987

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY, et al.,

*Petitioner,*

v.

AUBURN UNIVERSITY, et al.,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF OF RESPONDENT AUBURN UNIVERSITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the review of the Court of Appeals' decision by writ of certiorari is appropriate given the fact that the key element of the Court of Appeals' decision, the dismissal of the plaintiffs' claims under Title VI of the Civil Rights Act of 1964, is not challenged by the Petition?

2. Whether the Court of Appeals' decision to disqualify the trial judge is correct and in accord with the law of other circuits?

3. Whether the Court of Appeals was correct in holding that Alabama State University and Alabama A&M University, as instrumentalities of state government, had no legally cognizable right, and therefore no standing, under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983 or Title VI of the Civil Rights Act of 1964 to assert their claims in the district court?

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## STATEMENT OF THE CASE

Respondent Auburn University cannot accept the Petitioners' statement of the case because of omissions and misstatements that are significant to this Petition.

The involved history of this action since its filing in July, 1983, includes two prior unsuccessful certiorari petitions (No. 85-1878 and No. 86-749). The "standing" issue raised in this Petition was previously raised in No. 86-749,[1] as to which certiorari was denied, — U.S. —, 107 S. Ct. 1287, 94 L.Ed.2d 144 (Feb. 23, 1987).

The trial judge was disqualified on three independent grounds that were based on the record and substantiated by judicially cognizable, published legislative journals. None of these grounds relate to the race of the trial judge.

The Petitioners' statement of the case significantly mischaracterizes the decision of the United States Court of Appeals for the Eleventh Circuit. The Petitioners neglect to mention that the Court of Appeals, in its *per curiam* opinion by Judge Vance and Judge Kravitch and former Chief Judge John Brown of the United States Court of Appeals for the Fifth Circuit, dismissed the Complaint of the United States and the Knight Petitioners' claims under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d, because the theory asserted

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[1] In a prior decision authored by Judge Frank M. Johnson of the Eleventh Circuit Court of Appeals, 791 F.2d 1450 (11th Cir. 1986), it was held that Alabama State University (ASU) had no legally cognizable right, and therefore standing, to assert the claims raised in the district court. The subsequent *per curiam* opinion of Judges Vance, Kravitch and Brown extended this holding to Alabama A&M University (A&M).

by the United States and the Petitioners was inconsistent with the decision of this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), as well as numerous lower court decisions.

The Court of Appeals remanded the case to the Chief Judge of the Northern District of Alabama with instructions (1) that the Complaint of the United States be dismissed without prejudice, (2) that the Title VI claim of the Knight Intervenors be dismissed without prejudice, and (3) that the remaining claims be assigned to himself or another judge for a new trial or other proceedings not inconsistent with the opinion, 828 F.2d 1552, Petitioners' App. at 40a. The "heart" of the decision by the Court of Appeals is not (as Petitioners claim) the recusal issue, but the dismissal of the Title VI claims.

———o———

## SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied, because (1) dismissal of the Title VI claims required that the District Court order be vacated, (2) the decision concerning recusal is correct and consistent with the law in other circuits and (3) the "standing" issue presents no substantial question.

———o———

## ARGUMENT

### I. THE DISMISSAL OF TITLE VI CLAIMS, UNCHALLENGED BY THE PETITION, MAKES CERTIORARI INAPPROPRIATE.

The Petition focuses on the recusal issue, as if reversal of the holding of the Court of Appeals as to recusal would reinstate the District Court's December, 1985, order, and promptly effect substantial relief in favor of the Petitioners. That is simply not the case.

The Court of Appeals reversed the decision of the District Court, and remanded for dismissal of Title VI claims of all plaintiffs, because the Title VI claims were brought on an untenable "broad systemic approach" rather than program-specific liability under Title VI, *see* Petitioners' App. at 29a-39a.[2] The Court of Appeals rejected that theory as inconsistent with the decision of this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), as well as with the decision of the predecessor Fifth Circuit in *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969) (Petitioners' App. at 31a-39a). Thus, proceedings in the case are required to begin again, notwithstanding the substantial record and lengthy trial to which the Petition alludes.

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[2] The United States admitted, among other things, that the Title VI compliance investigation which preceded this suit was not program-specific, and that the Office for Civil Rights of the U.S. Department of Education ("OCR") had not identified any person denied the benefits of, or participation in, any federally-funded program. Nor did OCR find any "institutional" violation by Auburn or any other defendant college or university.

The Petition does not seek certiorari as to the dismissal of the Title VI claims. Therefore, the recusal and "standing" questions raised by the Petition should be viewed in the context of a case in which the Complaint has been dismissed without prejudice, and subsequent proceedings will take place in the District Court on a different theory, with different proof, regardless of the Court's disposition of those issues.

## II. THE COURT OF APPEALS' DECISION TO DISQUALIFY THE TRIAL JUDGE PRESENTS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

### A. The Grounds For The Decision Were Asserted In A Timely Manner.

The Petition raises several questions with respect to the disqualification of the trial judge. Principal among these is that Auburn waived certain grounds for recusal by not presenting them in a timely fashion. In so arguing, the Petition confuses the holding of Judges Vance, Kravitch and Brown concerning disqualification based on extrajudicial knowledge of disputed evidentiary facts under 28 U.S.C. § 455(b)(1) with questions of waiver of grounds under 28 U.S.C. § 455(a).

In this case, Auburn's motion for disqualification, filed on September 6, 1983, was timely. Auburn's initial motion raised three grounds for disqualification under 28 U.S.C. § 144 as well as under 28 U.S.C. § 455(a) and (b)(1). The grounds asserted from the outset included the trial judge's extrajudicial knowledge of disputed matters of fact, with specific reference to matters involved in *Lee, et al. v. Macon County Board of Education, et al.* (herein-

after *Lee v. Macon*), a state-wide education desegregation case involving several state colleges as well as elementary and secondary schools. The trial judge initially refused to consider affidavits filed under 28 U.S.C. § 144, and denied the motion as to 28 U.S.C. § 455 on all grounds asserted.

Auburn successfully petitioned for a writ of mandamus to require consideration of disqualification, and a senior district judge of the Northern District of Alabama ruled that the trial judge should be disqualified. That judge recused himself and withdrew his opinion. Subsequently, a senior circuit judge, sitting by designation, ruled that the trial judge should not be disqualified, and denied Auburn's request for permission to file an interlocutory appeal under 28 U.S.C. § 1292(b). The case then proceeded through discovery and trial.

On appeal, Auburn again raised the disqualification issue, including two grounds asserted in the District Court as well as two additional matters that were actually relied upon in the District Court's opinion on the merits, as to which the trial judge had personal knowledge of disputed evidentiary facts—the trial judge's active participation in the selection of Petitioner ASU's Board of Trustees and his co-sponsorship of an appropriation bill to provide facilities for Petitioner A&M.

The Court of Appeals opined that the trial judge should be disqualified under § 455(b)(1) because he had personal knowledge of disputed evidentiary facts. The Court of Appeals did not repudiate the concept of timeliness under § 455(b)(1), but correctly held that in the circumstances of this case, those matters could properly

be considered on appeal, 828 F.2d 1544, n.49, Petitioners' App. at 23a-24a.

No case cited in the Petition holds that grounds for recusal under § 455(b) may be waived, nor does any case hold that grounds under § 455(a) may be waived unless the trial judge has first disclosed the facts underlying the motion on the record. No case holding a disqualification motion untimely involved a motion filed as early as two months after the Complaint was filed and almost two years before the trial began, nor did any case hold that additional matters may not be raised in support of a timely motion for disqualification. To the contrary, the Court of Appeals for the Ninth Circuit has held that the filing of a motion under 28 U.S.C. § 144 "should also prompt the judge to whom the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of section 455(a) and (b)(1) . . . ." *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980). The failure of the trial judge to recuse himself under such circumstances, even in the absence of reference to specific facts supporting recusal, is then reviewable on appeal. *See Sibla*, 624 F.2d at 868; *see also Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

The Petitioners' assertion that there is a conflict among the circuits as to the concept of timeliness and as to whether an appellate court is precluded from considering the trial judge's extrajudicial knowledge of matters that were not first raised in the District Court is simply not correct.

The plain language of 28 U.S.C. § 455(e) is that grounds for recusal under § 455(b), such as those raised by Respondents, may not be waived under any circumstances, and that grounds for recusal under § 455(a) may be waived only after the trial judge's *disclosure on the record* of the grounds for disqualification. The matters asserted by Auburn as grounds for disqualification under § 455(b)(2) could not have been waived under any circumstances. *See Potashnick*, 609 F.2d at 1114. Similarly, they could not have been waived under § 455(a)(1) absent the trial judge's disclosure on the record of his prior involvement with matters in dispute in this litigation. *Id.*

*Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982), cited by Petitioners, does not support the Petition. There, the Court expressly joined the Second and Ninth Circuits in holding that "some sort of timeliness requirement is appropriate for the present version of § 455." In that case, however, the trial judge had given "a full and fair disclosure of his situation as regards to Defendants Porterie and Duke, and indeed described his acquaintance with them in painstaking detail." Specifically, the Court noted that "waiver is not possible if the situation falls within one of the specific categories listed in § 455(b)" and cited *Potashnick* for the proposition that matters supporting a disqualification motion discovered after the trial are properly raised for the first time on appeal. 666 F.2d at 122-123, n.4.

The fundamental distinction between the cases cited by the Petitioners and the case *sub judice* is that in the former the movants were made aware of the grounds for disqualification by the trial judge, and in most cases in-

vited to request his disqualification, but did not do so until an adverse decision on the merits had been reached. In the present case, Respondents moved for the trial judge's disqualification pursuant to §§ 144 and 455 almost two years prior to trial, pursued the matter on petition for writ of mandamus to the Eleventh Circuit Court of Appeals and later requested that the matter be certified for interlocutory appeal, but were never informed by the trial judge of his extrajudicial involvement with disputed evidentiary facts. Despite the issue of disqualification being raised, the trial court never disclosed nor invited inquiry into these matters, even though the issues in which he had been involved were issues of serious dispute throughout the litigation. Under such circumstances Respondents cannot be said to have waived either of these grounds.[3]

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[3] The Court of Appeals' decision to entertain the disqualification issue without further proceedings in the district court does not conflict with other circuits. The Court of Appeals certainly had jurisdiction to rule on recusal issues in the first instance, see *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980); *Potashnick v. Port City Construction Co., supra*. The other courts that have remanded for further proceedings prior to making such a decision have done so on the basis that, in their opinion, the record before them was not complete as to the issues involved. In the present case, the record developed in the district court is clear as to the factual matters in dispute. The newspaper article describing the trial judge and the ASU trustee appointments was produced by the United States in discovery after the initial recusal proceedings, and it was in the record as an exhibit to two subsequent depositions. The trial judge's involvement as attorney for plaintiffs in *Lee v. Macon* had been fully developed in the district court. Unchallenged public records confirmed the trial judge's involvement in the trustee confirmation process and his sponsorship of the A&M facilities bill. No further proceedings were necessary.

### B. The Court Of Appeals' Decision Was Correct On The Merits.

The Petitioners' allegation that the decision of Judges Vance, Kravitch and Brown on disqualification was made on the basis of race is a gross mischaracterization of the *per curiam* opinion. Neither Respondent's recusal argument in the Court of Appeals nor the Court of Appeals' decision was based on considerations of race. Rather, the Court of Appeals correctly held under § 455(b) that "[t]o permit Judge Clemon to decide a case in which he had extrajudicial, personal knowledge of disputed facts would be contrary to the express language of the statute, as well as the case law." Petitioners' App. at 27a-28a.

Petitioners' argument that Judge Clemon's involvement in the confirmation of a black majority on the ASU Board of Trustees and in appropriating funds to A&M to correct alleged inequalities in its facilities do not warrant disqualification because they are "two of the most common functions of a state legislator," overlooks the importance of those issues to the present case. The capital funding decisions made by the Alabama State Legislature, including the reason for the defeat of the bills co-sponsored by the trial judge, were disputed facts as to which two of the principal experts and several A&M witnesses testified. The very deficiencies in A&M's facilities that were itemized as justification for the bill co-sponsored by the trial judge were cited in his opinion as evidence of discriminatory capital funding. The trial court also found that the racial composition of the boards of trustees of A&M and ASU was a vestige of segregation.

The trial judge not only had knowledge of, but was intimately involved in, the determination of the racial composition of the ASU Board of Trustees as well as the A&M facilities appropriation bill. These involvements made it impossible for the trial judge to preside in this case. *See Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446-47 (6th Cir. 1980). Regardless of whether the trial judge's activities were typical of those of state legislators, his active participation "in the very events and . . . the very facts that are at issue in this suit," makes his disqualification mandatory.[4] (Petitioners' App. at 23a).

The Court of Appeals was also correct in disqualifying the trial judge on the basis of his involvement as a lawyer in *Lee v. Macon*. The admission into evidence of a report, over Auburn's objection, dealing with the precise factual issues and two specific school systems with which the trial judge dealt as a lawyer in *Lee v. Macon*[5] shows that "Judge Clemon was once again faced with evaluating evidence of which he had special extrajudicial knowledge." Petitioners' App. at 27a. "Whether, in a bench trial, a judge can avoid involvement destructive of impartiality

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[4] *Laird v. Tatum*, 409 U.S. 824 (1972), is inapposite. In that case Justice Rehnquist had no extrajudicial knowledge of relevant facts. 409 U.S. at 827. His only prior involvement with the issues in that case was to report to the Senate his understanding of the law regarding search and seizure. 409 U.S. at 825-826. Prior expression of a legal position is far different from having been involved in the precise facts in dispute.

[5] Having argued successfully at trial that the report was relevant, the Petitioners should now be estopped from resisting recusal by arguing that the report was not relevant.

where he has personal knowledge of material facts in dispute is a question that cannot be answered satisfactorily," *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d at 447.

## III. A STATE UNIVERSITY AND ITS BOARD MEMBERS HAVE NO SUBSTANTIVE RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AND THEREFORE HAVE NO STANDING, TO ASSERT CLAIMS THEREUNDER ON THEIR OWN BEHALF.

Petitioners challenge, for the second time, the opinion authored by Judge Frank M. Johnson in *United States v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 1287, 94 L.Ed.2d 144 (1987), that creatures of the state, such as A&M and ASU in the instant case, "may not raise a Fourteenth Amendment claim under Section 1983," Petitioners' App. at 144a; or a claim under Title VI of the Civil Rights Act of 1964. Petitioners' App. at 144a-46a. Certiorari was first denied as to this issue in Case No. 86-749.

Judge Johnson's opinion addressed only the standing of ASU to assert claims challenging State Board of Education regulations setting minimum standards for certification of teacher-education programs. The *per curiam* opinion of Judges Vance, Kravitch and Brown extended Judge Johnson's holding to the claims of ASU which sought to maintain "the seniority of Alabama State University as an autonomous, full-service senior institution," and of A&M, which sought similar relief based on its

status as "a traditionally black institution of higher education." Appendix at A-1; A-5-6; A-7.

In support of their argument that A&M and ASU have standing under 42 U.S.C. § 1983 and Title VI, the Petitioners cite a line of cases holding that local school boards may have standing to assert the rights of their students and faculty because the school board members have been placed in a position of either violating state law or the constitutional rights of their students or faculty. *See Board of Education v. Allen ("Allen")*, 392 U.S. 236, 241 n.5 (1968); *Akron Board of Education v. State Board of Education* ("*Akron*"), 490 F.2d 1285, 1290 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974); *Brewer v. Hoxie School District No. 46 ("Hoxie")*, 238 F.2d 91 (8th Cir. 1956).

Unlike the plaintiffs in the cases cited by Petitioners, however, A&M and ASU are not in the position of resisting a state law which they allege will force them to take action that will *increase* segregation. *See Allen* at 241, n.5; *Akron* at 1290; *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). The members of their boards of trustees are not claiming that actions of the state have put them in a position of either violating state law or the constitutional rights of their students. To the contrary, they have alleged that they have done everything in their power to desegregate, but that as traditionally black institutions they are entitled to preference in facilities, funding and programs. Where the conflict between adherence to state law and constitutional duty is absent, so is the basis for standing annunciated in *Allen* and its progeny. *Compare Allen, supra, and Akron, supra, with Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 998 (6th

Cir. 1987) *and City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 237 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) *and School District of Kansas City v. State of Missouri*, 460 F. Supp. 421, 440 (W.D. Mo. 1978).

A party's standing "must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively. . . ." *Thomas v. Board of Trustees*, 195 U.S. 207, 210 (1904); *accord Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.") ASU's and A&M's failure to assert the rights of their students or faculty in the district court precludes their claim of representative standing on appeal. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 89 L.Ed.2d 501, 516, 106 S. Ct. 1326 (1986).

The Court of Appeals squarely considered A&M's and ASU's claims to institutional rights under the equal protection clause and Title VI and correctly rejected them. *See Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor And City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *City of Newark v. New Jersey*, 262 U.S. 192 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 638, 4 L.Ed. 629 (1819). The claims asserted by A&M and

ASU in the trial court were designed to protect institutional interests of A&M and ASU, not the constitutional rights of their students or faculty. The Court of Appeals was correct in holding that A&M and ASU had no such right under the Fourteenth Amendment or Title VI, and therefore no standing to assert those claims. *See Kelley v. Metropolitan County Bd. of Educ., supra; Randolph County v. Alabama Power Co.*, 784 F.2d 1067 (11th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3473, 107 S. Ct. 878, 93 L.Ed.2d 833 (1987); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Delta Special School District No. 5 v. State Board of Education*, 745 F.2d 532 (8th Cir. 1984); *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n.3 (3d Cir. 1981) (*en banc*); *Village of Arlington Hts. v. Regional Transportation Auth.*, 653 F.2d 1149 (7th Cir. 1981); *Appling County v. Municipal Elec. Auth. of Ga.*, 621 F.2d 1301, 1308 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980); *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976); *City of New York v. Richardson*, 473 F.2d 923 (2d Cir.), *cert. denied, sub nom. Lavine v. Lindsay*, 412 U.S. 950 (1973).

———o———

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Attorneys for Respondent, Auburn University*

*Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CASE NO. |
| vs. | ) | CV-83-C-1676-S |
| | ) | |
| THE STATE OF ALABAMA, et al., | ) | |
| | ) | |
| Defendants. | ) | |

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State

University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth

herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD
By: /s/ SOLOMON S. SEAY, JR.

---

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Attorney for Board of Trustees
for Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of the same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

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The State of Alabama
The Alabama Public School and College Authority

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Paul Skidmore
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FOR: The University of Alabama

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FOR: Wayne Teague
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/s/ Solomon S. Seay, Jr.

EXHIBIT 1

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item #6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CASE NO. |
| v. | ) | CV 83-C-1676-S |
| | ) | |
| THE STATE OF ALABAMA, et al., | ) | |
| | ) | |
| Defendants. | ) | |

MOTION TO REALIGN OR IN THE ALTERNATIVE
FOR LEAVE TO FILE CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama

A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* In addition to the relief requested herein and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

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By /s/ JOE R. WHATLEY, JR.

Joe R. Whatley, Jr.

/s/ DONALD W. STEWART

Donald W. Stewart

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 25th day of July, 1983:

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Joe R. Whatley, Jr.

Supreme Court, U.S.
FILED
MAR 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1200

# In the Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY, ET AL., PETITIONERS

*v.*

AUBURN UNIVERSITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the disqualification of a judge under 28 U.S.C. 455(b)(1) may be based on evidence that was not presented to the district court assigned initial responsibility for resolving the disqualification issue.

2. Whether a state university has standing under the Equal Protection Clause or Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to challenge for its own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1200

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY, ET AL., PETITIONERS

*v.*

AUBURN UNIVERSITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 828 F.2d 1532. An earlier opinion of the court of appeals (Pet. App. 139a-154a) is reported at 791 F.2d 1450. The opinion of the district court with respect to the motion to recuse (Pet. App. 41a-61a) is reported at 582 F. Supp. 1197. The opinion of the district court with respect to the merits of the controversy (Pet. App. 62a-138a) is reported at 628 F. Supp. 1137.

### JURISDICTION

The judgment of the court of appeals was entered on October 6, 1987. On December 29, 1987, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including January 19, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibits recipients of federal financial assistance from discriminating on the basis of race in federally assisted programs or activities. In July 1983, the United States filed suit in the United States District Court for the Northern District of Alabama, alleging that the State of Alabama, the Alabama State Board of Education, and all state-supported four-year institutions of higher education in the State of Alabama, including Alabama State University (ASU) and Alabama A & M (A & M), two historically and predominantly black colleges, had been maintaining a racially segregated system of higher education in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 3a). Both ASU and A & M, however, moved for realignment as parties-plaintiff on the ground that their interests were antagonistic to those of the other defendants (*id.* at 5a n.1). In addition, John F. Knight moved to intervene as representative of a plaintiff-class of ASU graduates, black adults and minor children in Alabama presently attending or eligible to attend an Alabama higher education institution in the relevant geographic area, and black citizens who are or may be employed by these higher education institutions (*id.* at 4a-5a). The district court, with the Honorable U.W. Clemon presiding, granted these motions (*id.* at 4a-5a, 12a).

In September 1983, however, Auburn University and the State Superintendent of Education moved, pursuant to 28 U.S.C. 144 and 455, to disqualify Judge Clemon (Pet. App. 12a).[1] They argued that Judge Clemon's children were potential members of the plaintiff-class; that Judge

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[1] 28 U.S.C. 144 and 455 are reprinted in full at Pet. App. 13a-15a n.21.

Clemon had represented the plaintiffs in *Lee* v. *Macon County Bd. of Educ.*, 317 F. Supp. 103 (M.D. Ala. 1970), aff'd in part and modified in part, 453 F.2d 524 (5th Cir. 1971), a case which allegedly involved some of the same parties and presented some of the same issues; and that Judge Clemon knew and was sponsored for the bench by a member of the law firm that now represented Alabama A & M (Pet. App. 12a-13a, 18a-23a). Judge Clemon summarily rejected these arguments, finding that the affidavits accompanying the motions had not been signed by "parties," as required by 28 U.S.C. 144, and that a reasonable person viewing the true facts would not harbor doubts concerning his impartiality, as required by 28 U.S.C. 455 (Pet. App. 12a).

Auburn University filed a petition for a writ of mandamus to the court of appeals with respect to the disqualification issue (Pet. App. 12a). The court of appeals granted the petition and remanded the case "with directions that another judge be assigned to hear the recusal proceedings" (No. 83-7557 (11th Cir. Nov. 10, 1983), slip op. 1). Judge Hobart Grooms was then assigned to the case (Pet. App. 12a). He held an evidentiary hearing with respect to this matter and, on December 19, 1983, ruled that Judge Clemon should be disqualified (*id.* at 12a-13a). On January 19, 1984, however, Judge Grooms vacated his order and recused himself from deciding the disqualification issue (*id.* at 13a).

Accordingly, Senior Judge David W. Dyer of the court of appeals was assigned to the case (Pet. App. 13a). He determined that Judge Clemon need not disqualify himself from the underlying matter (*id.* at 41a-61a). Judge Dyer found that the affidavits filed by Auburn University and the Superintendent of Education "fail[ed] to state material facts with sufficient particularity to convince a reasonable man that a personal bias exists" (*id.* at 45a).

2. The case then proceeded to trial, with Judge Clemon presiding (Pet. App. 5a). While the case was pending, however, the Alabama State Board of Education determined that it would not recertify certain undergraduate and graduate teacher education programs of ASU (*id.* at 140a-141a). ASU and the Knight intervenors promptly moved the district court preliminarily to enjoin the Alabama State Board of Education from doing so (*id.* at 141a). On August 21, 1985, the district court issued the requested preliminary relief, finding that the decision not to recertifiy the teacher education programs was racially motivated and that the status quo should be maintained until the underlying action brought by the United States could be resolved (*id.* at 141a, 151a). On December 7, 1985, the district court found that, until 1965, each public college in Alabama was segregated by law and by custom, that between 1965 and 1975 the defendants had engaged in a series of actions which continued the racially dual system, and that the vestiges of the pre-1965 and 1965-1975 actions continued to exist in the Alabama higher education system (*id.* at 5a-6a, 62a-138a). Accordingly, it ordered the State, the Governor, the Alabama State Board of Education, and the Alabama Public School and College Authority to submit a remedial plan consistent with its findings to " 'eliminate all vestiges of the dual system' " (*id.* at 7a). All further proceedings were stayed, however, pending disposition of the defendants' appeals (*ibid.*).

3. In an opinion and order rendered on June 6, 1986 in review of the district court's August 21, 1985 order (Pet. App. 139a-154a), the court of appeals upheld the preliminary relief issued by the district court against denial of recertification of ASU teacher education programs. It first ruled that ASU did not have standing under either the Fourteenth Amendment or Title VI to challenge for its

own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part (*id.* at 141a-142a). The court found that "ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983" (*id.* at 144a) and that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute" (*id.* at 146a).[2] Concomitantly, however, the court found that "the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate" (*id.* at 151a), reasoning that "[t]he standing of the * * * intervenors remains unchallenged" (*id.* at 147a), that "even the partial demise of ASU would impede the ability of the trial court—and this [c]ourt on review—to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors" (*id.* at 152a), and that "the intervenors had a substantial likelihood of success on the merits" (*ibid.*). Thus, the court affirmed "entry of this injunction, on behalf of the intervenors, against the members of the [S]tate Board in their official capacities," and reversed "the district court's entry of any injunction on behalf of ASU * * *" (*id.* at 153a).[3]

4. On October 6, 1987, the court of appeals reviewed the district court's December 7, 1985 order, determined that Judge Clemon should have been disqualified from hearing the case and, accordingly, reversed and remanded

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[2] The court, however, rejected the "broad contention that [ASU], as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States" (Pet. App. 142a).

[3] The Board of Trustees of Alabama State University petitioned for certiorari on the court of appeals' ruling as to standing. The Court denied the petition (No. 86-749 (Feb. 23, 1987)).

without reaching the merits (Pet. App. 1a-40a).[4] It agreed with the district court that neither the presence of Judge Clemon's two minor children in the plaintiff class nor the judge's background as a civil rights lawyer and political figure in Alabama required disqualification (*id.* at 18a-23a). But the court held that Judge Clemon's involvement as a legislator with the matters at issue in the litigation did require the trial judge's disqualification (*id.* at 23a-29a).

The court rested its holding on the fact that, "[d]uring his tenure in the state legislature, the trial judge actively participated in the very events and shaped the very facts that are at issue in this suit" (Pet. App. 23a (footnote omitted)). Specifically, it found that, "[a]s chairman of the Senate Rules Committee, Judge Clemon played a critical role in the confirmation of those individuals nominated for positions on the board of trustees of the defendant institutions" (*id.* at 23a-24a), and "[y]et Judge Clemon explicitly found at trial that the composition of defendants' governing boards was a relevant and important factor in this finding of liability" (*id.* at 25a). It further found that, "[w]hile in the statehouse, Judge Clemon also helped spearhead a bill to appropriate $10,000,000 to Alabama A & M" (*ibid.*), yet "[a]t trial, A & M cited the defeat of this bill as evidence of racial animus" and thus "Judge Clemon was again forced to make factual findings about events in which he was an active participant" (*ibid.*). Finally, it found that Judge Clemon's involvement as a lawyer in the

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[4] The court also held (Pet. App. 29a-39a) that the United States had improperly alleged that the entire system of public higher education was covered by Title VI and had failed to identify the particular programs or activities at individual colleges receiving federal funds. The court instructed (*id.* at 39a) that, on remand, the United States should prepare and file a new complaint.

*Lee* v. *Macon County Bd. of Educ., supra,* litigation provided him with information relating to the discrimination suffered by black high school principals, a subject on which evidence was also presented in this case (Pet. App. 26a-27a). The court concluded that, as a result of his involvement in these matters, 28 U.S.C. 455(b)(1) required his disqualification, since Judge Clemon had "personal knowledge of disputed evidentiary facts concerning the proceeding" (Pet. App. 27a).

In reaching this conclusion, the court rejected the claim that it should "not consider Judge Clemon's activities as a state Senator since these facts were not presented to Judge Dyer" (Pet. App. 23a n.49). It acknowledged that "[t]he question of whether considerations of timeliness apply under [28 U.S.C.] 455 is a difficult one," noting that "Congress did not incorporate a time limitation into the amended statute, and courts have differed as to whether the timeliness requirement of the prior [Section] 455 survived" (*ibid.*). But the court ruled that, "[e]ven if the principle of timeliness has some application to motions brought under [Section] 455(b), it would be inappropriate to apply this principle under the circumstances of this case" (*id.* at 24a n.49). It reasoned that "[t]hose courts that have adopted a timeliness requirement have done so 'to prevent litigants from abusing motions to disqualify as dilatory tactics or as a means to "sample the temper of the court" before deciding whether to raise an issue of disqualification' " (*ibid.* (citations omitted)), that "[a]ppellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim" (*ibid.*), that "[m]otions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout" (*ibid.*), that "[a]ppellants did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and

raised this ground for disqualification at the first available moment" (*ibid.*); and, finally, that "[g]iven the critical importance of the appearance of impartiality guaranteed by [Section] 455," it would not "adopt the cramped interpretation of this statute asserted by appellees" (*ibid.*).

## ARGUMENT

The decision of the court of appeals does not merit review by this Court. Although the United States adheres to its position that disqualification was improper since the claims were either untimely or lacking in merit, it is clear that the disqualification issue is essentially a factual one and that the resolution of this issue by the court below does not conflict with any decision of this Court or of any other court of appeals. Moreover, this Court has already declined to review the question whether ASU has standing to challenge for its own benefit the racially discriminatory actions of the state-created system of which it is a part (No. 86-749), and the question is no more deserving of review at this time.[5] Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners initially err in suggesting (Pet. 14-15) that the decision below conflicts with the holdings of other courts that a litigant must raise in a timely fashion the grounds on which it seeks to disqualify a judge under 28 U.S.C. 455(b). To be sure, there is a conflict among the circuits on this question (compare *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980) (party may not await outcome of trial before seeking to disqualify trial judge on basis of information known to party before trial); *Delesdernier* v. *Porterie*, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839 (1982) (same); and

[5] We are lodging with the Clerk and sending to petitioners a copy of our brief in opposition in No. 86-749.

*United States* v. *Conforte*, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980) (same), with *United States* v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986)). This conflict may be short-lived, however, because, as petitioners concede (Pet. 15 n.8), the Seventh Circuit "appears to be ready to reconsider." Moreover, the court of appeals in this case did *not* decide whether a time limitation applies to disqualification motions under 28 U.S.C. 455(b). Rather, it held that, even assuming that such a limitation applies, the motion for disqualification in this case was timely filed (Pet. App. 23a-24a n.49). The court found that "[m]otions to disqualify Judge Clemon were filed at the earliest stages of the litigation and aggressively prosecuted throughout," and that "[respondents] did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and raised this ground for disqualification at the first available moment" (*ibid.*). Accordingly, the decision below does not add to the circuit conflict or provide a vehicle for resolving it.

2. Petitioners similarly err in suggesting (Pet. 15-18) that the decision below conflicts with decisions of other courts in which remands were ordered to permit the development of a factual record on the disqualification issue. In the cases that petitioners cite, the remands were ordered because the facts material to the disqualification issue were in dispute. See *Health Services Acquisition Corp.* v. *Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), cert. granted, No. 86-957 (Mar. 9, 1987); *Price Bros.* v. *Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981); *United States* v. *Conforte*, 457 F. Supp. 641, 645 (D. Nev. 1978). Here, by contrast, the court of appeals apparently concluded that the facts material to the disqualification issue were not in dispute and that the issue could be resolved without further

factfinding by a district court; the court of appeals believed that the undisputed facts established that Judge Clemon was intimately involved as a state legislator with matters at issue in this case. See Pet. App. 23a-29a. Accordingly, its decision not to remand the case for further proceedings is not in conflict with the decisions that petitioners cite.[6]

3. Petitioners next argue (Pet. 18-22) that the facts upon which the court of appeals relied do not require Judge Clemon's disqualification. But the question is inherently fact-bound and non-recurring. Accordingly, in our view, it is not sufficiently important to justify review by this Court.[7]

4. Finally, petitioners err in suggesting (Pet. 22-27) that the court of appeals erred in holding that ASU and A & M were without standing under either the Equal Protection Clause or Title VI to challenge for their own benefit the racially discriminatory actions of the state education system of which they are a part. This Court has long held that, "[b]eing but creatures of the State, municipal corporations have no standing to invoke the * * * provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *Coleman* v. *Miller*, 307 U.S. 433, 441 (1939) (footnote omitted). See generally *Williams*

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[6] Petitioners note (Pet. 13-14) that this Court has granted certiorari and heard argument in *Liljeberg*, which involves a question concerning the timeliness of a disqualification motion under 28 U.S.C. 455(a). But petitioners properly do not ask that their petition be held pending the disposition of *Liljeberg*. That case involves allegations concerning the "appearance of impropriety" of a judge, not personal knowledge of important facts. Accordingly, the decision there should not bear on the proper resolution of the timeliness question that sometimes arises under 28 U.S.C. 455(b).

[7] There is no basis for petitioners' suggestion (Pet. 14) that the disqualification decision in this case was based upon Judge Clemon's race.

v. *Mayor of Baltimore,* 289 U.S. 36, 40 (1933); *Risty* v. *Chicago, R.I. & Pac. Ry.,* 270 U.S. 378, 389-390 (1926); *Trenton* v. *New Jersey,* 262 U.S. 182, 188 (1923); *Hunter* v. *Pittsburgh,* 207 U.S. 161, 179 (1907). Title VI likewise is designed to protect individual rights and, in enacting that statute, Congress made no suggestion that it was granting state-created entities any rights that heretofore were unavailable under the Fourteenth Amendment. Cf. *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause"); *id.* at 328 (opinion of Brennan, White, Marshall, Blackmun, JJ.) (same). Accordingly, the decision of the court below—that state-created entities like ASU and A & M may not rely on either the Equal Protection Clause or Title VI to challenge for their own benefit the discriminatory actions of the state that created them—is correct.

Petitioners acknowledge (Pet. 23) that "a line of cases [from this Court exists] holding that disputes between arms or creatures of a State do not normally implicate federal rights." But petitioners repeat the argument that was advanced, and that this Court declined to review, in No. 86-749, to wit, that the court of appeals failed to consider cases "which have allowed claims such as those asserted here when they were brought by state-created entities or their board members, in pursuit of their obligation under the Supremacy Clause to conform their conduct to the federal Constitution or a federal statute" (Pet. 23). As we noted in our brief in opposition in No. 86-749 (at 6), however, the court of appeals could not consider an argument that was not presented to it. ASU did not argue to the court of appeals that it was representing the interests of its students, faculty, or administrators, or that it was

pursuing an obligation under the Supremacy Clause to conform its conduct to the federal Constitution or a federal statute.

Rather, ASU argued only that it had standing as an *institution* to seek the preliminary injunction. Thus, in answering respondents' argument to the court of appeals that petitioner ASU was without standing, ASU contended only that "Alabama State University as a creature of the State has federally protected rights under the Constitution and the Laws of the United States" (ASU C.A. Br. 21). Accordingly, the court below had only to decide "whether any given constitutional provision or law protects *the interests of the body in question,*" to wit, ASU. See Pet. App. 143a-144a (emphasis added). Petitioners' recharacterization of the cause in this petition for a writ of certiorari cannot change the question presented to and decided by the court below.[8]

Petitioners therefore err (Pet. 22-26) in suggesting that the decision below conflicts with decisions of this Court and other courts which have held that state-created entities may challenge on behalf of their students, faculties, and board members the discriminatory actions of their state-creators. The school boards in the cited cases either alleged that a state statute or some other state action required a constitutional or statutory duty to be violated by board members (see, *e.g.*, *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982); *Board of Educ.* v. *Allen*, 392

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[8] As we noted in our brief in opposition in No. 86-749 (at 6 n.1), it may be that ASU *intended* to argue to the court of appeals that it was representing the interests of its students, faculty, and administrators, as well as the interests of the institution as a whole. But, as we also noted there (*ibid.*), ASU did not make these intentions clear to the court of appeals and, accordingly, the fault in the decision below, if any, lies with ASU, not with the court of appeals.

U.S. 236 (1968)), or that they were representing the constitutional rights of their students or faculty (see, *e.g.*, *Akron Bd. of Educ.* v. *State Bd. of Educ.*, 490 F.2d 1285 (6th Cir.), cert. denied, 417 U.S. 932 (1974); *Bradley* v. *School Bd.*, 338 F. Supp. 67 (E.D. Va.), rev'd on other grounds, 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided court, 412 U.S. 92 (1973); *School Bd.* v. *Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987)). Here, by contrast, ASU alleged only that its own rights as an institution were in issue. Thus, it is clear that petitioners ask this Court to resolve a conflict that does not exist.

The suggestion (Pet. 26-27) that the decision below "leaves a significant gap in the means of protecting the constitutional rights of [their] students" is equally meritless. The United States and the intervenors in this litigation have adequately represented and will continue adequately to represent the students and faculty of the Alabama schools—the persons who would truly benefit from the desegregation of the Alabama system of higher education.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Association (CCTA) request reconsideration of the interim must carry rules on the grounds they unconstitutionally intrude on the First Amendment rights of cable operators, programmers and subscribers.

20. TBS argues that the interim must carry rules are a prior restraint on constitutionally protected speech in that they preclude cable operators' programming selections, compel certain substitutions, and impose severe sanctions for refusals to comply. Thus, it states that there is a heavy presumption against their constitutional validity and that a standard of review more stringent than the *O'Brien* standard should apply. TBS further argues that the new rules are unconstitutional even under the more lenient *O'Brien* standard. It states that the Commission failed to demonstrate that maximizing viewer choices is a substantial governmental interest that would be harmed in the absence of must carry rules. In this regard, TBS criticizes the Commission for adopting interim must carry rules despite its findings that cable systems have continued to carry local stations since the former must carry rules were invalidated and that viewer choice is increased where cable systems do not carry local stations. In addition, it states that the Commission failed to adequately investigate the market situation with respect to the use and availability of built-in and outdoor antennas and takes the position that the Commission is obligated to show that a six month consumer education program is insufficient to rectify any existing problem of subscriber awareness of the need for alternative reception capabilities.

21. TBS further states that the interim must carry rules are not narrowly tailored to meet the purported need. In this regard, it specifically criticizes the exemption of smaller cable systems from must carry obligations, the 25 percent channel capacity cap, the five year term of the interim must carry rules, the requirement that cable systems carry duplicating noncommercial stations, the viewing standard and the requirement that must carry signals be

carried on the lowest-priced separately available tier of service. TBS thus requests that we eliminate the interim must carry rules.

22. Century argues that the interim must carry rules are content-based and, thus, *O'Brien* is not the appropriate standard for review. In this regard, Century states that in making their programming judgments, cable operators exercise their editorial discretion relative to speech content. Thus, Century argues, the rules directly interfere with communicative activity by designating certain sources that must be included by cable editors and by according preferences to certain favored classes of speakers, such as those who are local and popular. Century also claims that *City of Renton v. Playtime Theatres, Inc. (Renton)*[9] is inappropriately applied by the Commission in its constitutional analysis of the new regulations, as the rationale for time, place and manner restrictions cannot be used to condone intrusions into program content and distribution. It further argues that Without *Renton*, the Commission's rationale cannot be sustained. Century concludes that the Commission's constitutional analysis of the must carry rules improperly blends content regulation with market entry and other non-communicative aspects of cable television. Therefore, Century seeks elimination of the interim must carry rules.

23. CCTA takes the position that the five year sunset provision does not justify unconstitutionally intruding on First Amendment rights. It cities *Century Federal, Inc. v. City of Palo Alto (Century Federal)*,[10] for the proposition that intrusions on cable operators' speech rights are not acceptable merely because they are limited in duration. CCTA thus argues that the infirmity of the interim must carry rules is not cured by the five year sunset provision.

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[9] 106 S.Ct. 925, 54 U.S.L.W. 4160 (1986).

[10] 648 F. Supp. 1465 (N.D. Cal., Dec. 3, 1986).

CCTA proposes that if the Commission decides to retain the interim must carry rules, then it should select a shorter interim period that is more in keeping with the regulatory program goal of educating consumers. In this regard, it argues that there is nothing in the record of this proceeding to suggest that a five year period is needed to accomplish the educational task.

24. CCTA also submits that input selector switches should not be mandatory; rather, they should be available for sale or lease to subscribers who request them pursuant to a strong information requirement, somewhat like the cable "parental control" device. As CCTA sees it, this modification offers two advantages: 1) it would not impose unnecessary costs on customers who do not need or desire an input selector switch; and, 2) it would allow a market for built-in input selector switches to develop. CCTA contends that the Commission's approach, if implemented, would impede the development of That market because subscribers would have no reason to buy receivers with built-in switches if cable systems provide switches for free.

25. The Texas Cable TV Association, filing jointly with four other cable interests. (Texas Cable) contends that the consumer education information requirement is unconstitutional since the Supreme Court has outlawed mandatory "consumer interest" messages of the kind adopted by the Commission to effect its decision. In support, it cites Pacific Gas and Electric v. P.U.C. of California (Pacific Gas),[11] which, it states, held that mandated access to "extra space" in billing envelopes for consumer advocacy group messages violated the First Amendment rights of a regulated utility. Moreover, Texas Cable maintains that the education program is inconsistent with the Commission's underbrush decisions to leave the regulation of broadcasters' trade practices to the FTC and the Better Busi-

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[11] 106 S.Ct. 903, 54 U.S.L.W. 4149 (1986).

ness Bureau, and with the 1985 Fairness Report, in which the Commission determined that the public interest is not served by forcing broadcasters to telecast messages on controversial issues of public importance.

26. The Association of Independent Television Stations, Inc. (INTV) requests reconsideration of the sunset provision of the interim must carry rules. INTV contends that it is unlikely that the "fair and open competitive market environment"[12] for programming sought by the Commission can be achieved within five years through the input selector switch and consumer education requirements. It argues that various cable and broadcast industry studies and reports, including that submitted by the Joint Petitioners as discussed above, demonstrate that input selector switches are flawed, ineffective mechanisms for recapturing the access to off-the-air broadcast signals that is lost when cable service is installed.

27. INTV cites the NCTA and NAB studies, which, it states, show the technical problems with the input selector switch plan. Additionally, INTV states that it pointed out in its original comment in this proceeding the difficulties in using input selector switches with cable-ready sets and/or videocassette recorders (VCRs). It also submits that input selector switches are totally unusable for many TV viewers who are prohibited from erecting outdoor TV antennas, live in apartment buildings, or otherwise "cannot or will not" use input selector switches due to local zoning regulation or complexity of operation.

28. INTV further argues that even if the input selector switch rules did provide adequate subscriber access to off-the-air broadcast signals, the market environment envisioned by the Commission will never be achieved unless and until Congress and the Commission eliminate a panoply of regulatory and statutory policies that insulate cable

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[12] *See Report and Order, supra* at para. 133.

systems from the market in which broadcasters compete. According to INTV, these policies include: 1) the cable compulsory copyright license; 2) entry barriers to cable competition from telephone companies, broadcast stations, and television networks; and, 3) Commission-approved abrogation of local television stations' exclusive local program exhibition licenses. It states that sunset of the must carry rules will, absent concurrent actions on the part of the Commission and Congress, leave undisturbed this regime of "cable friendly" regulation that insulates cable from the forces of marketplace competition. Thus, INTV argues that the government interest in maximizing diversity in program choices and fostering competition among program sources will be ill-served in the absence of ongoing, limited signal carriage rules.

29. INTV is also concerned that the Commission apparently "dismissed" Section 307(b) of the Communications Act, which requires that radio frequency services be distributed "among the several states and communities" in a fair and equitable manner, as a component of the federal interest supporting the interim must carry rules. It submits that localism and free, local broadcast service remain preeminent communications policy objectives and important federal interests. INTV states that there is no statutory interest comparable to that expressed in Section 307(b) for non-local program services available only to persons who are willing to pay for them. It submits that the Commission's seeming equation of free local broadcast service with non-local, subscription? narrowcast services such as cable networks is, therefore, unwarranted! It argues that the Commission's disregard for Section 307(b) is unwarranted, unsupportable, and inconsistent with its statutory mandate and must be corrected on reconsideration.

30. INTV requests that the interim must carry rules be retained until the fair and competitive market environment we seek has actually been achieved. It suggests that we adopt a system-by-system sunset of our must carry rules

to be effective upon: 1) elimination of all the above-mentioned governmentally mandated protections of cable systems from the free market in which local broadcasters and all other video program distributors must operate; and, 2) introduction of intra-modal competition, that is, a second cable system into the community. In the alternative, INTV requests adoption of the "permissible signal carriage" rule which it initially proposed in this proceeding. Under that proposal, the cable operator would choose either to invoke the compulsory copyright license by carrying all "local" signals or to negotiate separately with copyright holders for use of their work. INTV further submits that if we decide to retain The five-year sunset provision, we should indicate willingness to consider, as an aspect of our consideration of continuing relief in particular situations where continuing signal carriage rules might be necessary, the possibility of extending the rules beyond their scheduled expiration date.

31. To support ongoing signal carriage rules, INTV argues that the Commission's constitutional analysis should rely more confidently on the standard established in *O'Brien* and other applicable Supreme Court decisions. In this respect, INTV states that the Commission's analysis is basically correct but is not complete. It submits that the Court's holding in *Renton* makes clear that regulations which are not aimed at suppression of speech, that is, those that are "justified" without reference to the content of the regulated speech, are constitutional if they are designed to serve a "substantial government interest" and "allow for reasonable alternative avenues of communications."[13] INTV asserts that the interim must carry rules, without the input selector switch rules, satisfy this test, including the second part of it, by leaving at least 75 percent of cable system' channel capacity free from any signal carriage obligation. If further argues that the in-

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[13] *Renton, supra* at 928-930.

terim must carry rules clearly satisfy the *O'Brien* standard even in the absence of the Court's decision in *Renton.* In this respect, INTV observes that the Court recently affirmed in *United States v. Albertini (Albertini)*[14] that "an incidental burden on speech is no greater than essential, and therefore permissible under *O'Brien,* so long as the content-neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

32. Richard Leghorn seeks revision of our basic approach for resolving the must carry matter. He submits that we took the good idea of relying on input selector switch requirements as a long term means to achieve our goals, but then misapplied it in a manner that satisfies no one and fails to accomplish those goals. Specifically, Leghorn objects to what he terms are: 1) our unnecessary and excessive reliance on external switches; 2) the massive information campaign required of cable operators to cure a market dysfunction caused by the former rules; and, 3) the five additional years of unnecessarily intrusive must carry rules. He contends that we did not develop a complete record on input selector devices and, thus, we failed to satisfy the requirements of administrative rule making and we further failed to identify the least intrusive means of achieving our policy objectives. Leghorn argues that the two-part regulatory program is technically impractical and infringes the First Amendment rights of cable operators.

33. Leghorn argues that the *Report and Order* fails to recognize that, in the long term, input selector switches built in during the manufacture of television receivers are significantly superior to external switches. He states that there are a number of advantages to use of electronic, internal switches, including: 1) purchase and maintenance costs would be lower; 2) technical performance would be

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[14] 472 U.S. 675, 105 S.Ct. 2897, 2907 (1985).

substantially better; 3) the dangers of signal leakage to air navigation and increased risks of lightning harm resulting from poor grounding would be practically eliminated; and 4) the home television environment would be "friendlier" for consumers. Leghorn asserts that our input selector switch rules will suppress demand for receivers with internal switches because cable subscribers will not purchase receivers with built-in switching capability when they are provided mechanical, external switches free of charge.

34. Leghorn characterizes the consumer education program as, in effect, compelling cable operators to advertise the availability of their off-the-air competition, an approach which he says will greatly waste time and money and engender consumer confusion and resentment. Leghorn contends that the education requirement cannot be justified as a mere consumer protection mechanism, since it directly forces an industry to advertise the whereabouts of its competitors without requiring any effort by the competitors themselves. Consequently, Leghorn submits that the consumer education program is unconstitutional, as cable operators may not wish to use their facilities to advertise their competition, and these rules will in many instances compel operators to speak. In support, Leghorn principally cites *Pacific Gas*, in which he states the Supreme Court agreed with the contention of a regulated utility that it had a First Amendment right not to be required to use its own property to help spread a message with which it disagrees. Texas Cable essentially agrees with this analysis. Leghorn proposes that responsibility for carrying the burden of consumer education be shifted to broadcasters and/or the Commission.

35. Finally, Leghorn asserts that the interim must carry rules are unconstitutional. He argues that more exacting scrutiny than the *O'Brien* standard is required to evaluate these rules. In this respect, Leghorn contends that the Commission's interpretation of *Renton* in its rationale for

applying *O'Brien* was incorrect. He argues that *Renton* only applies when the regulation at issue is not directed at the content of the communications involved, and that it does not stand for the proposition that any regulation is content-neutral simply because it is viewpoint-neutral. He futher states that by contrast with the situation in *Renton*, the interim must carry rules are directly concerned with the content of speech because they rank categories of speech and speakers. Leghorn also contends that the Commission incorrectly applied the *O'Brien* test by ignoring the impact the must carry rules will have on the content of a cable operator's speech. In addition, he asserts that the rules coerce speech by forcing cable operators to retransmit television programming which they might not otherwise carry.

36. In view of the above, Leghorn requests that we conduct a supplemental inquiry to develop a public record on the relative costs, technical performance, safety, and consumer convenience aspects of external switches versus switches that are built-in to television receivers, including current designs and feasible improvements in such devices. He proposes that, after conducting this injury, we adopt rules generally in accordance with his earlier proposal to require manufacturers to build switches into television receivers and related control equipment, and require cable systems for an interim period to provide external switches only when they choose not to carry all local VHF signals. He maintains that the Commission has authority to mandate these built-in switches under the All-Channel Receiver Act of 1962, 47 U.S.C. §303(s). Leghorn also suggests that his proposal be modified to require that cable operators who do not carry all local VHF signals provide external switches, but be permitted to charge for their installation. He states that this will alleviate our concern that his proposal would operate as an incentive for cable systems to carry a fixed set of signals as a way to avoid expenses. Leghorn further requests that we adopt performance spec-

ifications as a means to ensure that manufacturers develop switches that consumers can safely install themselves.

37. Taft Broadcasting Company (Taft) urges the Commission to issue a Notice of Inquiry to investigate the technical adequacy of input selector switches, the extent to which viewers are in fact able to erect antennas, the comparative quality of off-the-air signals and the cable signals of the same station, and the extent to which viewers will choose to watch a superior quality television signal over a signal of inferior quality even when the viewer might prefer programming content of the inferior signal. Taft suggests that the Commission continue to suspend the input selector switch requirements and the five year sunset period pending the outcome of the inquiry, but that it implement the new must carry rules to ensure that cable subscribers will continue to have access to off-the-air television stations.

38. Range Television Cable Co., Inc. (Range) urges the Commission to reconsider its input selector switch rules to create an exemption for cable systems that provide all available off-the-air broadcast signals to their subscribers as part of their basic tier of cable service. Range submits that the effect of the rules adopted is to cause cable systems carrying all local signals to incur the additional expense of installing input selector switches for no good reason and, at the same time, cause increased costs for subscribers.

39. Continental Cablevision, Inc. (Continental) states that it generally supports the NCTA, CATA and NAB petition and strongly opposes the blanket requirement to install input selector switches without regard to whether a cable system is inhibiting the reception of local television signals. In this regard, Continental states that it would not oppose a rule requiring installation of an input selector switch at any future date (even after the sunset of the interim must-carry rules) for subscribers of systems that

cease to carry signals defined by the Commission's rules as local. Such an exemption also is supported by the National Independent Television Committee (NITC), which requests in the alternative that the input selector switch rule not be applied Where cable systems are subject to full competition, i.e., where telephone companies can offer cable television services and cable systems are not protected by the compulsory copyright license.

40. The Office of Communication of the United Church of Christ, Henry Geller, and Donna Lampert (UCC) submit a joint petition criticizing the new rules as an imposed government solution that looks good on paper but does not realistically address the important public policy interests at issue. UCC argues that input selector switches will never be an effective means for providing access to off-the-air signals that are not carried by a cable system. They point to the various technical problems with the switches indicated in the NCTA report, although they also suggest these problems are being exaggerated for tactical purposes. UCC believes that because of the inconvenience of switching to antenna reception and then tuning to a station, it is unlikely that consumers will actually use switches to gain access to a relatively few stations not carried by their cable system. They submit that the input selector switch requirement will impose costs on the industry and the public and will not further our policy objectives.

41. UCC also argues that we have not properly defined the public interest. They argue that we were incorrect in determining that the federal interest was concerned not with the service of particular local broadcasters, but rather with preserving during the interim period the program source diversity provided by the system of broadcasting. In this respect, UCC states that the preservation of local service is mandated by Section 307(b) of the Communications Act.

42. UCC argues that the proper analysis of the must carry situation is that cable has inserted itself into the broadcast signal distribution scheme and is, therefore, subject to reasonable Commission regulation to ensure that its actions are consistent with the foundations of that scheme. They assert that these foundations require the maintenance of healthy local broadcast outlets. They acknowledge that there is a changed circumstance—the development of many cable program services and the difficulty in carrying all broadcast and cable services on systems with limited channel capacity—that militates against mandatory carriage of all available broadcast signals.

43. Because of these changed circumstances, UCC submits that the Commission, if it is to act reasonably, must restrict mandatory carriage rights to those stations truly in need of cable carriage. They maintain that the categories of stations in need are those set forth in their comments and replies in this proceeding. Thus, they request must carry protection be established as follows: 1) carriage of all local stations in sparsely populated areas (e.g. blow the top 100 markets), regardless of channel capacity; 2) carriage priority for public broadcasting stations, community stations, and UHF independents (initial license period) in situations involving cable systems with limited capacity in the top 100 markets. Under the UCC proposal, there would be no mandatory carriage for VHF stations in the top 100 markets, regardless of cable system channel capacity, and no mandatory carriage would be afforded unless the station is serving as a significant local outlet, i.e. broadcasts more than 40 percent local programming directed to serving the needs and interests of the community.

44. They also argue that regulation that is reasonably related to the public interest in the signal carriage matter would not violate the First Amendment. UCC submits that cable interests cannot insist upon the right to import dis-

tant signals, to the detriment of local signals in rural areas, of new UHF independents, or of local public broadcasting service. Moreover, they contend that even if the *O'Brien* test were used, the approach in their proposal would easily pass constitutional muster in that it would provide protection for an important and substantial federal interest and its incidental impact on the alleged First Amendment freedoms would be the minimum necessary to the furtherance of that interest.

45. In its reply comments, Pico Macom, Inc., which states that it is the leading supplier of input selector switches for the cable industry, refutes petitioners' claims that there are technical problems with the available input selector switches that render them unsuitable for use with cable service. Pico Macom submits that its current switch, the "Macom AB-2" meets or exceeds all of the technical specifications required by the cable industry, including isolation, insertion loss, and return loss. It also states that its factory testing process proves that This switch will withstand at least 10 years of very hard use. Pico Macom also contends that Gill Industries, as discussed below, dramatically overstates the extent to which the use of a properly installed input selector switch will cause objectionable interference to television viewing.

46. Pico Macom also submits that petitioners, particularly Joint Petitioners, have greatly overstated the cost of compliance with the switch rules. It states that based on a poll of three major distributors, cable operators can purchase its switch for as little as $2.25 per switch. Pico Macom argues that Joint Petitioners also have inflated the long term cost of the switch by underestimating its useful life. It states that the actual switch life of 10 years will significantly reduce the costs of labor and hardware for switch replacement/repair claimed by Joint Petitioners. Pico Macom also submits that Joint Petitioners have overstated the costs of providing transformers for use with switches

because not every subscriber will need such a device.[15] Finally, it claims that petitioners have failed to recognize that the price of switches, transformers, and jumper cables is likely to fall by as much as 10 percent if the rule goes into effect, as production efficiencies will be realized with the increased demand.

**Evaluation of Basic Policy Issues**

47. We are not persuaded that we should alter the basic approach of our two-part program for resolving the must carry matter. In this respect, we find unpersuasive petitioners' arguments that we incorrectly assessed the federal interest and that the two-part program is an unworkable solution to the must carry matter. Rather, we continue to believe that the undesired effects of our former must carry rules will be best resolved by a regulatory program that includes both input selector switch and interim must carry requirements. This approach is both the most effective and the least intrusive means to achieve our objectives to alter consumers' existing practices and knowledge concerning the need for off-the-air reception capability and to provide an orderly transition to a new environment in which cable mandatory signal carriage regulation will no longer be necessary. We are confident that the fundamental approach of the program adopted in the *Report and Order* is the appropriate course of action in this matter. However, we recognize petitioners' argument that the program, is adopted, imposes significant costs and implementation burdens on the cable industry. Therefore, we are modifying certain provisions of the program. We believe that these modifications are responsive to

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[15] Pico Macom states that a transformer is necessary only if the subscriber's antenna is connected with 300 ohm flat wiring. It argues that in many instances antennas are connected to receivers with 75 ohm coaxial cable and, for support, points to the statement in Gill Industries' petition that 51 percent of its customers in the San Jose, California have only coaxial leads for antenna input.

petitioners' concerns and will enhance the long-term effectiveness of the basic two-part program to achieve our objective of ensuring viewers' access to the maximum number of program choices available through cable and off-the-air broadcast television facilities.

48. *The Federal Interest.* We find no merit in INTV's and UCC's position that we incorrectly or otherwise improperly treated Section 307(b) of the Communications Act as a component of the federal interest in the must carry matter. In the *Report and Order,* we observed that our assessment of the federal interest is premised on concerns different from the Section 307(b) concerns relied upon by the Commission in initially adopting the former must carry rules. We found that the structure of the overall video market has changed and that this change is primarily due to the emergence of the cable industry as a means for distributing new program services. These findings led us to conclude that it is no longer appropriate nor desirable to treat cable purely as a supplementary or auxiliary video distribution service and to protect local television service in competition with cable service. Therefore, consistent with the statutory goals contained in Sections 151 and 303(g) of the Communications Act, and Section 601 of the Cable Communications Policy Act of 1984 (Cable Act),[16] we determined that the public interest would be better served by a policy that maximizes program choices rather than one that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers. While we did not, therefore, rely specifically on Section 307(b), we did find that the plan we adopted also contributes towards the Section 307(b) statutory goals.

49. We continue to believe that it is desirable to proceed toward an environment where we no longer will protect

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[16] 47 U.S.C. §§151 and 303(g); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §§1 *et seq.*, 98 Stat. 2779 (1984).

the broadcast industry from competition with the cable industry.[17] In maintaining this position, we are cognizant of our mandate to distribute radio frequency services "among the several states and communities" in a fair and equitable manner. We believe our two-part program contributes to Section 307(b) objectives by fostering independent access to local off-the-air television services so that such stations may operate in a fair and open competitive environment with other providers of video services. To protect the broadcast industry *per se* in furtherance of Section 307(b), would have the effect of limiting access to program choices. Such a policy might diminish the overall public interest with respect to our mandate to "make available to all the people of The United States a rapid, efficient communications service" and to "generally encourage the larger, more effective use of radio" under Sections 151 and 303(g) of the Communications Act. It might also impede the intent of the Cable Act, as expressed in Section 601 thereof, to establish a national policy that encourages the growth and development of cable services and assures that cable systems are responsible to the needs and interests of the local communities They serve.

50. *Feasibility of Input Selector Switches.* We believe that the technical problems described by those seeking elimination of the input selector switch requirements are much overstated. First, improper installation of switches by subscribers is not likely to be a cause of harmful signal leakage. Cable subscribers generally will be able to install these devices properly themselves if they are provided with appropriate instructions, including directions to immedi-

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[17] Nothing in this Memorandum Opinion and Order is intended to prejudice our decision on any of the issues raised by Satcom, Inc. in its petition for rule making proposing rules relating to multiple ownership of cable systems. The Commission requested comments on that petition in a Public Notice issued June 19, 1986, RM-5475.

ately check for proper switch operation. The primary potential for interference is that switches could be installed such that the cable output would be connected directly to the antenna, and thus would radiate the full bandwidth of the input cable signal. Such connections will not be a major problem because when they do occur, the switch will be unable to alternate between the input sources and the installer/subscriber will realize immediately that something is wrong and take corrective action. Another factor that must be considered in assessing the interference potential of input selector switches is whether a separate terminal device is used to receive cable service and, if so, whether the switch is installed on the cable or receiver side of the terminal device. Where a terminal device is used, and the switch is between it and the television receiver, the risk of interference resulting from improper installation is particularly low. In such cases, the direct connection of the terminal device output to the antenna through improper switch installation would result in radiation of only the device output. Because the output of the device is on a channel unused for broadcasting (generally either channel 3 or 4), the potential for interference created by accidentally coupling the terminal device to the antenna is very low. In cases where switches are built-in to television receivers and TV interface devices, the potential for interference is even less.

51. Evidence that subscribers can make complex cable connections correctly is provided by the fact that there have been no widespread problems or difficulties encountered by consumers in installation of cable-ready VCRs and receivers. We also observe that, as addressed in Gen. Docket No. 85-301, many cable subscribers now are acquiring and successfully installing their own cable terminal/converter equipment.[18] We are aware of no widespread or

[18] *See Notice of Proposed Rule Making* in Gen. Docket No. 85-301, 50 FR 42729 (1985); and *Further Notice of Proposed Rule Making* in Gen. Docket No. 85-301, 51 FR 31147 (1986).

general problem with consumers' installation of this equipment and believe that consumers also can correctly install input selector switches. In any event, those who contend consumers cannot properly install switches present no credible evidence to support their claim.

52. Second, we do not believe that input selector switches will degrade reception of cable service or permit signal leakage that will cause interference to off-the-air reception. Section 15.606(a) of our rules specifies a 60 dB isolation standard under which millions of transfer switches have been authorized (as components of video games, computers and other devices).[19] We are unaware of any interference to off-the-air reception attributable to any of these switches (mechanical or electronic), failing to isolate the antenna port sufficiently. Therefore, we believe that the 90 dB of isolation that Joint Petitioners claim is necessary to avoid these problems far exceeds that which is actually required in most instances. With regard to interference to cable reception, we observe that the signal strength received by the antenna and delivered to the receiver input terminals in most locations is substantially less than the 40 dBmV signal claimed by petitioners. Thus, for most installations, switch isolation of 60 dB appears sufficient to prevent interference to cable reception. In those areas close to broadcast transmitters, direct pick-up interference at the receiver tuner would frequently offset any additional protection provided by higher switch isolation. In those rare instances where greater switch isolation would be worthwhile, this fact could be brought to subscribers' attention so that they may act accordingly. We also find no evidence in the record to indicate that

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[19] Section 15.606(a) specifies a maximum voltage which may be generated at the antenna terminals of an antenna Transfer switch. For a typical cable system using 75 ohm coaxial cable and signal amplitudes of 3.16 millivolts (+10 dBmV), the switches must exhibit an isolation of at least 60 dB.

use of properly designed input selector switches would result in unacceptable insertion or return loss. In fact, as discussed by ATC and Pico Macom, switches that appear to provide acceptable technical performance are available now. Moreover, we are aware that similar switches are available from many other manufacturers and have been in use by cable subscribers for some time. We are aware of no reports of general leakage or other performance problems with any of the switches currently available. However, while we are confident that input selector switches can be used without leading to harmful interference, we recognize the importance of the switch technical performance issue and the need for appropriate standards to ensure that their use does not lead to harmful interference. Accordingly, we plan to initiate a separate proceeding, as discussed below, to consider technical standards for such switches.

53. Third, we find no merit in petitioners' arguments that input selector switches will fail or "wear out" even before the interim must carry rules expire. As Pico Macom indicates, reasonably priced switches that are capable of providing many years of service under heavy use are available now. Finally, we previously have addressed petitioners' claims that use of input selector switches would render unuseable certain features of cable subscribers' television receivers, VCRs and cable converters. As we stated in the *Report and Order*, any such problems can be overcome through relatively minor modifications to switching devices. Cable operators and other equipment suppliers can provide the information and/or assistance consumers may need to install switches in a manner that will enable operation of all the various features of video equipment.

54. Finally, we find no need to conduct further inquiry into the feasibility of input selector switch requirements as an effective element of our policy for resolving the must carry matter as argued by Taft and Leghorn. We disagree with petitioners who contend that the record in this pro-

ceeding did not provide sufficient information to support the input selector switch requirements. The record adduced at the *Report and Order* stage of this proceeding addressed issues and included evidence and information concerning the benefits and potential problems associated with use of input selector switches in connection with cable service. In any event, the abundant additional information submitted on reconsideration corrects any deficiencies that might have existed in the record. Thus, the information currently before us with respect to switch costs, technical performance, consumer convenience, switch compatibility with other equipment, and use of antennas for off-the-air reception is more than sufficient to support our decision in this proceeding. We note, moreover, that input selector switches have been at issue since Turner's initial petition for rule making to eliminate the former must carry rules and that it was part of the *Quincy* court's findings.

55. *Other Input Selector Switch Issues.* We also are not persuaded by petitioners' arguments that other policy considerations render the input selector switch requirements unworkable as part of the solution to the must carry matter. We continue to disagree with petitioners that consumers will find input selector switches impractical to use. As we indicated in the *Report and Order*, consumers are becoming increasingly accustomed to switching between alternate program input sources, particularly in conjunction with use of VCRs.

56. We also continue to reject Leghorn's proposal to require manufacturers to build input selector switches into new television receivers. In the *Report and Order*, we fully considered this proposal. There we indicated that it is not desirable to require all receivers to be built with a feature intended for use only by cable households. We further recognized that cable subscribers purchasing cable-ready receivers may prefer a more sophisticated external switching device and, thus, may not need built-in switching capability. We concluded that market forces are the most

appropriate means to determine both the number of receivers to be produced with built-in switches and the specific design of those features. We also observe that the desirable features of integral switches described by Leghorn also can be incorporated into switches built-in to video peripheral equipment such as VCRs and cable converter/controllers. Most of these features also can be made part of stand-alone switching devices.

57. We do not find that the input selector switch rules should be modified to permit the exemptions requested by Joint Petitioners, Range, NITC, and Leghorn. Those petitioners generally seek exemptions from the switch requirements in cases where cable systems either choose to carry all available off-the-air signals or are subject to direct competition from one or more other cable systems. Leghorn's proposal to require cable systems to provide external input selector switch requirements for an interim period only where they do not carry all local VHF signals would be particularly undesirable. This proposal would encourage cable systems to carry a fixed complement of broadcast signals (namely the VHF signals) and, thus, would be contrary to our intention that cable operators have the greatest flexibility possible to tailor their program services to meet viewer preferences. As proposed, this solution to the must carry matter would not address in any way The issue of access to the signals of stations other than those VHF stations that would qualify as "local signals." We also reject Adelphia's request that input selector switches not be required for new cable subscribers. We believe that new subscribers are just as likely to have the same misperceptions as existing subscribers. Many "new subscribers" in fact have subscribed previously to cable service while the former must carry rules were in effect.[20] In addition, many

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[20] In this respect, we note that annually, approximately one-third of new cable customers nationwide formerly subscribed to cable service. Remarks of James P. Mooney, President and CEO, NCTA, before the National Press Club, Washington, D.C., January 12, 1987.

first-time subscribers also are likely to have formed the misperception as a result of contacts with existing cable subscribers and from information provided in media sources and cable sales literature. Moreover, we believe it is important during the transition period to make affirmative efforts to encourage the installation and use of input selector switches.

58. *Must Carry Policy.* In the *Report and Order,* we concluded that short-term must carry rules are necessary to ensure that broadcasting remains a competitive alternative source of programming during the transition period. We also recognized that such rules are a stringent form of regulation that intrudes on cable operators' free speech rights. Thus, we found that must carry rules are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers.

59. We are not persuaded by petitioners' arguments that we should alter our decision to adopt interim must carry rules on policy grounds. First, we reject TBS' argument that we did not demonstrate that interim must carry rules are warranted. In the *Report and Order,* we found that there is evidence that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations. In weighing the evidence of cable industry behavior in the absence of must carry rules, we also considered that many cable operators thus far may have been hesitant to act as if there were no such rules pending the outcome of this rule making proceeding. In particular, we observed that NCTA leaders apparently have suggested to members that they continue to carry local signal until this matter is settled.[21] We further determined that cable subscribers

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[21] *See also Report and Order, supra* at n. 159.

generally have not maintained independent off-the-air reception capability and that there is ample evidence that cable penetration nationwide has reached a level such that there is potential for this problem to affect a substantial portion of the population. While it is difficult to provide an accurate forecast of the effects of cable systems' signal carriage practices in the absence of must carry rules on viewer access to program choices, the evidence is sufficient to demonstrate that many cable subscribers may not have access to local broadcast signals during the transition period. Because a significant portion of the viewing public might not have access to broadcast signals, the competitive structure of the video programming industry could be materially harmed in the transition period. Thus, mandatory signal carriage rules are needed to ensure the competitive viability of broadcast television service during the transition to the new competitive environment.

60. Second, we disagree with the position of Joint Petitioners and INTV that continuing must carry requirements are necessary on the ground that the input selector switch and consumer education rules will not achieve their intended objectives. As indicated above, we remain confident that the input selector switch and consumer education aspects of our program are a workable means to ensure that cable subscribers will gain and maintain the awareness of the need for, and have the opportunity to acquire, capability to receive broadcast signals off-the-air. We also remain confident that requiring must carry rules on an interim basis will prevent disruption of the flow of television services to the public and will facilitate an orderly transition to a new market environment in which must carry regulation is no longer necessary because consumers will have both the awareness and capability to use switching devices to alternate between cable and broadcast program services.

61. Third, we also reject INTV's and NITC's argument that continuing must carry rules are needed to prevent

disequilibria in the marketplace resulting from other regulatory and statutory factors. In the *Report and Order*, we recognized that these other factors also may tend to distort competition in the video market in a manner that may adversely affect viewers' access to program choices. While we indicated our intention to separately examine these other regulatory and statutory factors,[22] we determined that our action in the signal carriage matter is supportable in its own right based on the evidence in the record of this proceeding. In this regard, the D.C. Circuit in *Committee to Save WEAM v. FCC* found that the Commission may rely on competitive market forces to achieve its public interest objectives even where market imperfections exist.[23] While the compulsory license and the like may prevent ideal market conditions, they do not preclude basic competition in the market; and the latter is all that is needed to justify reliance on market forces.[24] Accordingly, we find no new information or evidence in these petitioners' submissions to alter our conclusion that these factors are separable issues and resolution of the signal carriage matter is not affected thereby. Therefore, we continue to maintain that there is no justification for the long-term intrusion on cable operators' First Amendment rights that would be imposed by continuing signal carriage rules.

62. On the other side of this issue, it would not be desirable to shorten the transition period as argued by

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[22] On February 12, 1987, We initiated two proceedings to address these issues. We adopted a *Notice of Proposed Rule Making* Gen. Docket No. 87-24, FCC 87-65, released April 23, 1987, which proposed to repromulgate some form of syndicated exclusivity rules, to strengthen the network non-duplication rules, and to delete the current non-network program territorial exclusivity rules. We also adopted a *Notice of Inquiry*, Gen. Docket No. 87-25, FCC 87-66, released April 23, 1987, to examine the effects of cable's compulsory copyright license on competition between the cable and broadcast television industries.

[23] 808 F.2d 113, 117 (D.C. Cir. 1986).

[24] *Id.*

CCTA. We believe that our decision to allow for a five year transition period reflects a sound predictive judgment and rational exercise of our broad discretion to engage in regulatory "line drawing" in furtherance of our public interest responsibilities.[25] As indicated in the *Report and Order*, we determined that a five year transition period is necessary not simply to provide consumers with sufficient time to become aware of the need for independent access to off-the-air broadcast signals, but also to acquire or reacquire such capability if they so desire by installing indoor or outdoor antennas. Further, this period is necessary not only to educate consumers about the need for input selector devices, but also to provide sufficient time for the design, development, and marketing of equipment that will provide consumers with a continuing and effective off-the-air access capability.

63. Finally, for the reasons we indicated in the *Report and Order*, we continue to reject UCC's proposal for new must carry rules that restrict carriage rights to only those "significant local stations" that are "in need" of carriage.[26] There, we found that UCC's proposal was not only unsuited to the current need for must carry rules during the transition, but also that it would, in fact, hinder rather than promote viewer access to program choices in the interim period! We observe that UCC's resubmission of its earlier proposal in this proceeding is predicated on its assertion that we improperly defined the federal interest in this matter. As we indicated in the *Report and Order*, and reiterate here, "[o]ur objective in adopting these rules is neither to penalize nor to benefit any particular station," but rather "to temper, during an interim period, potential threats to the program source diversity provided by the

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[25] *See generally FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1977).

[26] *See Report and Order*, *supra* at paragraph 177.

system of broadcasting."[27] Inasmuch as we find that argument incorrect, as discussed above, we need not further address UCC's request.

64. *Constitutional and Statutory Issues.* After reviewing the relevant Federal case law, we determined in the *Report and Order* that intrusions on the First Amendment rights of cable operators are subject to a more stringent standard of review than that currently applied to broadcasters, that the interim must carry rules could properly be classified as content-neutral and that, using the standard for analyzing the propriety of content-neutral regulations, the rules furthered the substantial federal interest of maximizing the viewing choices available to consumers and were narrowly tailored to meet that objective. A number of petitioners now maintain that our determination of the must carry regulations' content-neutrality was incorrect, and make various arguments against our use or application of the *O'Brien* standard[28] to evaluate the constitutionality of the overall must carry program. Petitioners further claim that the input selector switch requirement is fatally overbroad, that the five-year sunset provision does not sufficiently limit the rules' intrusions on cable operators' First Amendment rights, and that the consumer education component of our overall plan unconstitutionally compels cable operators to speak and to advertise their broadcast competitors. We will address these arguments in turn.

65. Several petitioners address our application of *O'Brien* in the *Report and Order* and the content-neutrality of the interim must carry rules. TBS claims that the interim must carry rules constitute a prior restraint on protected speech under the First Amendment because the

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[27] *Report and Order, supra* at paragraph 198.

[28] Generally, under *O'Brien* and subsequent cases, a government regulation that imposes an incidental burden on speech will be upheld if it advances a substantial governmental interest and is narrowly tailored to further that interest. *Report and Order, supra,* at 894.

rules act to preclude cable operators' programming selections, compel cable operators to make particular signal substitutions, and impose sanctions for refusals to comply. Consequently, TBS states, the *O'Brien* test is inappropriate to judge the constitutionality of the rules, and stricter constitutional analysis should be applied. Century and Leghorn maintain essentially that the interim rules are not content-neutral because they improperly interfere with the protected editorial discretion of cable operators by designating classes and preferences of speakers and by forcing operators to carry signals which they otherwise may not choose to program.

66. We reject the suggestion that these rules should not be considered as content-neutral for purposes of constitutional analysis. The interim must carry rules require only that for a limited time, cable systems must devote a limited portion of their channel capacity to carriage of broadcast signals available off-the-air in their community. As we stated in the *Report and Order*, the interim rules make that determination based not on the content of those signals, but on criteria wholly unrelated to their content—namely, their proximity to the cable headend and the extent to which they are viewed. Moreover, they do not forbid dissemination of any particular signal or signals. Where, as here, The primary purpose of a regulation is not the promotion or suppression of particular viewpoints, the regulation in question is considered to be content-neutral.[29] The interim rules are intended to further the maximization of viewer choice, "not . . . to prefer broadcast viewpoints over those of cable operators or program-

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[29] In contrast, the use of prior restraint analysis to determine the constitutionally of a government regulation is appropriate only when the restriction imposed by the regulation in question is content-based. Prior restraint of a speaker seeks to prevent the dissemination of some *particular* viewpoint. *See e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

mers."[30] Consequently, the rules are content-neutral for purposes of constitutional evaluation; the use of the *O'Brien* standard for evaluating content-neutral regulations is therefore fitting in this context.[31]

67. The arguments of all three petitioners implicitly assert that the content-neutral test itself is flawed because the indirect effects of those rules upon programming judgments should not be considered an incidental burden on speech. This is a conclusion we are not empowered to reach; this Commission will not second-guess the Supreme Court on the formulation of constitutional tests and standards. TBS Century and Leghorn all intimate that any attenuation of cable operators' programming discretion, no matter how indirect, is presumptively invalid—a thesis which our review of the pertinent case law belies.[32] The interim must carry rules are "consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.' "[33] Therefore, petitioners' arguments must fail.

68. Adelphia and TBS argue that we have failed to demonstrate a substantial federal interest to justify the new rules. In this regard, they claim that we have failed to

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[30] *Report and Order*, *supra* at 893.

[31] Carriage of noncommercial educational television stations during the transitional period is required to further the uniquely important Federal interest in ensuring continued access to programming "that is not subject to the same market forces as commercial broadcast and cable television." *Report and Order*, *supra* at 879.

[32] We note that even in assessing the constitutional implications of regulations affecting newspapers, the First Amendment does not "necessarily bar[ ] every regulation which in any way affects what the newspapers publish." *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute v. FCC*, 396 U.S. 842 (1969). *See also Associated Press v. U.S.*, 326 U.S. 1 (1945).

[33] *Renton*, *supra* n. 7, at 929 (quoting *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Board of Pharmacy)*, 425 U.S. 748, 771 (1976) (emphasis added)).

amass a sufficient evidentiary basis to substantiate the existence of the problems which justify further must carry regulation and our conclusion that input selector switches will assist in maximizing consumer viewing choices. However, our decision in those respects has been reached after weighing the voluminous comments and studies submitted in this proceeding, our own studies on the changing system for providing television service in this country and The evolving role of cable television in that system, and various congressional determinations and amendments to the Communications Act encouraging diversity of programming and competition in the cable television industry. We further observed that, due to "the rapidly evolving nature of the cable industry and changing competitive incentives resulting from the continuing development of satellite programming services carried by cable systems and other factors . . ." it is not clear that timely studies could be performed to obtain an accurate forecast of the actual effect of abandoning must carry rules.[34]

69. Therefore, our decision to implement the input selector switch requirements and interim must carry rules was based on the consideration of all available evidence combined with our special expertise in this field of regulation, a combination that we found was ample to demonstrate the substantial Federal interest at stake and how our solution to the must carry matter best furthers that interest. We concluded, and still believe, that our long-term goal of maximizing viewer choice can be achieved only after correcting consumers' misperceptions that cable systems will carry all available off-the-air signals and that the only available means to view broadcasting signals is through their cable systems, and after providing subscribers with the opportunity to obtain the hardware to switch

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[34] *Report and Order, supra* at 894, n. 159.

between off-the-air and cable program sources.[35] We also concluded that it is necessary to provide interim must carry relief to the broadcast television industry for a time to ensure that it remains a competitive alternative source of programming as we move to an environment without must carry rules. Consequently, a must carry program limited in duration and less intrusive on cable operators than the former rules remains necessary to ensure that cable subscribers retain access to off-air signals during the transitional period after the input selector switch rules take effect.

70. Adelphia and TBS also claim that we failed to demonstrate that the new rules are the least burdensome alternative on cable operators to achieve any substantial federal interest. We do not disagree with the proposition, both as a matter of sound economic regulatory policy and of constitutional doctrine, That we should seek the least burdensome alternative, and we have attempted to fashion rules adequate to the task at hand with that objective in mind. However, in our judgment, petitioners' argument reveals a misunderstanding of the applicable test for establishing the constitutionality of the interim rules. The proper standard for review was recently expressed thus by the Supreme Court:

> [R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien,* so long as the neutral regulation promotes a substantial governmental inter-

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[35] TBS' argument that switches are not necessary because most cable operators have not dropped local broadcast signals is not persuasive. Moreover, because our interest is in ensuring *maximum* program choices, even the dropping of one two signals frustrates that objective if the owner does not have the knowledge or equipment to obtain these signals directly off-the-air.

est that would be achieved less effectively absent the regulation.[36]

Moreover, we are afforded a broad degree of discretion in crafting rules to accomplish our public interest objectives[37]

71. We concluded in the *Report and Order* that the interim must carry rules are narrowly tailored to meet our objectives, and that the burden on cable operators' speech imposed thereby is no greater than necessary to ensure that program source diversity in broadcasting is not threatened during the transition to a video marketplace without must carry rules. We noted that the interim rules avoid overbreadth and undue burdens on cable operators by exempting cable systems with capacities of 20 channels or less, by providing for absolute limitations on the number of stations a non-exempt system is required to carry, by narrowing the criteria for a broadcasting signal to be qualified for must carry status, and by restricting the duration of the rules to a five-year period. The rules further ensure that local broadcast signals will be available to all subscribers by requiring their availability on the lowest priced tier. We believe that the refinements we are making to both the interim must carry rules and the input selector switch and consumer education requirements, as described below, further ensure that our two-part program is properly tailored and thus constitutionally permissible.[38]

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[36] *Albertini, supra* n. 12, at 2907 (citations omitted). *See also Arcara v. Cloud Books, Inc.*, 54 U.S.L.W. 5060, 106 S.Ct. 3172, 3175 (1986).

[37] *See Quincy, supra* at 1459; *see also White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1519 (D.C. Cir. 1984).

[38] Adelphia argues that the input selector switch requirements are overboard for three reasons: 1) they fail to provide an exemption in cases where an input selector switch would serve no purpose (for example, in situations where all local VHF broadcast stations are carried on a local cable system or where no local VHF signals are receivable off-air in the cable system area); 2) they should not be applied to new

72. While Adelphia and TBS urge us to adopt a solution which is less intrusive on cable operators' First Amendment rights, specifically, the immediate elimination of all must carry requirements, we are not persuaded that there is an alternative that would meet the need to preserve cable subscribers' access to off-the-air broadcast programming during the transition period. That is, because of the perception caused by our former rules' requirement that all local broadcast signals be carried on cable, subscribers will lack both the awareness and capability in the short run to access broadcast signals that are not carried by cable. Although the awareness should be gained once the consumer education programs begin, as described below, it is our best judgment that a five year period is needed to permit subscribers to regain the capability—by installing both switches and antennae. Therefore, we continue to believe that our solution to the must carry matter is the most appropriate and effective means of ensuring that the public interest is served.

73. CCTA claims that the five-year sunset provision for the interim must carry rules does not cure their constitutional infirmity. It cites *Century Federal* to support its proposition that abridgement of cable operators' First Amendment rights is not permissible merely because it is of limited duration. CCTA urges us to select a shorter sunset period of no longer than one year for the interim rules, and declares that the record in this proceeding does not indicate that a five year period is the most appropriate to accomplish the Commission's goals.

74. Initially, we note that *Century Federal* is readily distinguishable from the instant situation. That case in-

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subscribers, since only previously existing subscribers would suffer from the misperception that local broadcast signals cannot still be received through external antennas; and, 3) they should not be mandatory, but rather optional. *See* para. 16, *supra*. We believe these arguments are resolved by our modifications to the input selector switch requirements, detailed below at paras. 78-83.

volved a potential cable operator's First Amendment challenge to Palo Alto, California's use of an exclusive franchising arrangement to limit to one the number of cable operators granted access to the facilities necessary to install cables within the city. In granting a motion for partial summary judgment, the district court held that the insignificant (if any) disruption to the public domain caused by the installation of more than one cable system does not constitute a substantial or important governmental interest so as to warrant suppression of all cable speakers save one, and that even if the cable television market in a particular area is a natural monopoly, no justification exists for greater governmental regulation of cable operators than is otherwise permitted under the First Amendment.[39] In contrast, the must carry matter involves not the total suppression of a speaker to promote a governmental interest of uncertain value, but an incidental burden on a speaker's First Amendment rights for a limited period of time to further the substantial governmental interest in maximizing viewer choice.

75. The propriety of a given time period to accomplish our objectives in making the transition to a regulatory environment free of mandatory signal carriage restrictions is, of course, something that cannot be quantified through empirical analysis.[40] The five-year sunset period was selected because, in our judgment, it is the most reasonable time period in which to impose limited mandatory carriage while ensuring that the consumer education program is completed and cable subscribers have an opportunity to reestablish independent access to off-the-air broadcast television service. We believe that, after that time, the marketplace can be relied upon to maximize program choices for the nation. The five-year period also will allow us an

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[39] *Century Federal, supra* n. 8.

[40] Significantly, we observe that CCTA does not suggest any method by which this might be accomplished.

ample opportunity to observe the transitional cable and broadcast marketplace for purposes of our prospective rule making to determine whether mandatory carriage should continue to be required in particular instances beyond the sunset of the interim rules. Consequently, for all these reasons, we continue to believe that the five-year sunset period is necessary and appropriate.

76. Texas Cable and Leghorn criticize the consumer education requirement of our two-part regulatory program as adopted in the *Report and Order*, claiming that it is unconstitutional because it compels cable operators to advertise the existence of their competitors and coerces cable operators to spread a message with which the operators may disagree. Texas Cable likens the consumer education requirement to the kind of required "consumer interest" message recently struck down by the Supreme Court in *Pacific Gas*. Leghorn contends that case supports his position because the Court there agreed with the utility's contention that it had a First Amendment right not to be required to use its own property to help spread a message with which it disagrees.

77. Petitioners' arguments misconstrue the purpose and function of the consumer education requirements. The requirements as modified below direct only that cable operators list Television stations that may be available off-the-air in the community that are not carried on their cable systems at the time the listing is provided, and give general guidelines as to the information to be provided to subscribers about the input selector switch requirements and the carriage of local television stations. A regulated entity may be required to provide certain information to protect substantial or important interests of its customers. For example, Section 631 of the Cable Act[41] requires cable operators to inform subscribers in writing of the nature,

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[41] 47 U.S.C. §551.

etc., of personally identifiable information collected or to be collected about them and the possible uses of that information. The consumer education information requirements at issue here, including the identification of uncarried signals, similarly further the public interest by educating consumers about changes in the video marketplace that affect their ability to receive programming. We believe that this requirement can be imposed under Sections 2(a), 4(i), and 303(r) of the Act to advance the important federal interest in maximizing program choices.[42] We also note that the consumer education requirement fosters Section 307(b) objectives by facilitating access to off-the-air television. However, the guidelines do not require operators to provide any further information or inducement that solicits subscribers to actually *view* the video "competition", *e.g.*, a description of the general format or programming of the uncarried television station or stations to interest subscribers in switching to their off-the-air capability to watch programs carried on that signal. Without such an inducement, we do not believe that the mere identification of uncarried television stations as part and parcel of our overall program of educating video consumers about the changes in the signal carriage rules and their possible need for input selector switches constitutes "advertising" of those stations.[43] While the Supreme Court, in *Central*

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[42] *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *see also Report and Order* in CC Docket No. 81-893, 95 FCC 2d 1276, 1293-94 (1983).

[43] For example, Leghorn, in characterizing the consumer education program as "advertising," states that "Broadcasting already devote considerable promotional effort to identifying their video fare." However, our program requires only the identification of a signal, not information about any programming carried on that signal. Video consumers are induced to view a station because of desirable *programming*, not because they are informed that a station operates on a particular channel. These petitioners also neglect to note a crucial difference between the consumer education program and "advertising"—namely, that we are requiring dissemination of this information only

*Hudson Gas & Elec. Corp. v. Public Service Commission of New York (Central Hudson),*[44] recognized the need to protect commercial speech due to the importance of the information function of advertising, it does not follow that any or all information required to be provided by a regulated entity regarding changes in rules and obligations which affect service to its customers constitutes advertising *per se.*[45] In any event, "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . [the] constitutionally protected interest in *not* providing any particular factual information in [a business"] advertising is minimal."[46]

78. Insofar as a purely informational requirement like the one adopted in this proceeding is entitled to First Amendment protection,[47] it is well settled that restrictions that incidentally burden speech are justified if the regulation is content-neutral, serves a substantial governmental interest and is not more extensive than necessary to further that interest.[48] Equally permissible are restrictions on

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to their business customers, not to the public at large. In addition, we note that the Commission has imposed similar disclosure requirements in the common carrier area. *See Policy and Rules Concerning the Furnishing of Customer Premises Equipment*, 95 FCC 2d 1117, 1143 (1983).

[44] 447 U.S. 557, 563 (1980).

[45] *Pacific Gas, supra* at 908, n. 9, is inapposite in this regard, since the "speech" involved there was a utility's newsletter that "extend[ed] well beyond speech that proposes a commercial transaction." The Court clearly distinguished applicable law relating to disclosure requirements by businesses. *Id.* at n. 12.

[46] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 2285 (1985).

[47] Even commercial speech consisting of purely factual matter without an advertising component is entitled to a measure of First Amendment protection. *Virginia Board of Pharmacy, supra* n. 24, at 762.

[48] *See Friedman v. Rogers*, 440 U.S. 1 (1979).

false, misleading or deceptive commercial speech.[49] Moreover, we note that "disclosure" requirements for commercial speech are not subject to "a strict 'least restrictive means' analysis. . . ."[50] We believe that the guidelines as to the information which must be provided to consumers are a permissible, minimally intrusive form of directing the manner in which that information is presented and of assuring that consumers are not misled or deceived about the function of the input selector switch requirement and the meaning of and impact which the interim must carry rules and their expiration may have on their viewing choices and habits. In reaching this conclusion, it is important to point out what the consumer education requirements do *not* mandate. We are not attempting to confine or limit the commercial expression of cable operators on particular issues.[51] or to particular language in describing features and effects of the new rules, but, rather, we seek to provide only a measure of accuracy with regard to commercial information disseminated in one area—that of the general requirements and possible effects of our two-part regulatory program. Similarly, we do not attempt to circumscribe what may be said about the two-part program, but only require, in the interest of educating video consumers who are cable subscribers, a minimum of information about how our new regulations may affect their ability to receive local television signals. Consequently, these information requirements are narrowly tailored to serve the important commercial speech objective of "assist[ing] consumers and further[ing] The societal interest in the fullest possible dissemination of information,"[52] dur-

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[49] *See Virginia Board of Pharmacy, supra* n. 24, at 771-772.

[50] *Zauderer, supra* at 2282, n. 14.

[51] *Cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[52] *Central Hudson, supra* n. 32, at 561-562.

ing the transitional period to a video marketplace free of mandatory carriage requirements.[53]

79. Finally, we believe that the substantial modifications to the input selector switch requirements we are making herein will resolve Adelphia's concerns that the input selector switch requirements adopted in the *Report and Order* contravene Sections 622 and 623 of the Cable Act. The revised switch requirements will not restrict the amount cable systems may charge for services and/or equipment. Further, neither the input selector switch requirements nor the interim must carry rules impose any new requirement regarding the content of cable services as addressed by Section 624 of the Cable Act. As we noted in the *Report and Order*, we believe that the specific reference to the former must carry rules by the House Report

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[53] Texas Cable claims that the consumer education program also is inconsistent with our decisions to eliminate various policies regarding trade practices of broadcasters under our "underbrush" proceedings and with our 1985 finding that the fairness doctrine is contrary to the public interest. We observe that the underbrush decisions eliminated policies that often were not under this Commission's areas of expertise and/or were duplicative of other policies. Where alternative remedies or market forces would serve to deter an undesired practice, we eliminated the policy in question. *See e.g., Elimination of Unnecessary Broadcast Regulation*, 57 RR 2d 913 (1985), *recon. denied*, 58 RR 2d 864 (1985), *aff'd sub nom. Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986). In contrast, as we have determined in this proceeding, the must carry matter requires our intervention to assure that the information disseminated to subscribers is consistent with implementation of the rules and policies adopted herein. Moreover, we find no correlation between the informational requirement here and rules that we have raised questions about relating to regulatory oversight of the correct balance of coverage of particular kinds of issues by broadcasters. The latter concerns not factual "disclosure requirements for business corporations," *Pacific Gas and Electric*, 106 S.Ct. at 911, n.12, but speech regarding matters of public concern, which is entitled to the highest degree of encouragement and protection. *See 1985 Fairness Report*, 102 FCC 2d 143, 149-50 (1985).

on the Cable Act[54] expresses Congress' intention that we had, and continue to have, the authority to promulgate regulations to further the substantial Federal interests at issue in this proceeding, including the authority to use must carry rules and to amend them if necessary.[55] Consequently, the adoption of interim rules is well within our discretion under the Cable Act and, moreover, does not constitute a "new" addition to the content of cable services within the meaning of Section 624 of the Act.[56] On the contrary, the new rules require considerably less to be carried than the former rules.

**Basic Policy Rule Modifications**

80. While we remain confident that the basic elements of our regulatory program are practically, technically and legally feasible means for achieving our policy objectives, we find that certain features of that program should be modified to accomplish better those objectives. In particular, the input selector switch rules, as adopted, may impose burdens on cable operators that are greater than necessary to correct the viewer misperception problem and also may tend to limit cable operators' and consumers' flexibility to choose switching equipment appropriate to their specific circumstances. Also, the consumer education requirements may not provide cable operators sufficient

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[54] "Regulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements." H.R.Rep. No. 934, 98th Congress, 2d Sess. at 70 (1984).

[55] *Report and Order* at 896. In this connection, we observe again that the *Quincy* court ruled only that The must carry requirements at issue there were unconstitutional, and expressly reserved judgment on the question of whether any must carry requirements could pass constitutional muster.

[56] The fact that the *Quincy* court vacated the rules does not alter this conclusion. Section 624(f)(2)(A) of the Cable Act prohibits only the adoption of new content regulations not in effect on September 21, 1983. The must carry rules were undisputably in effect on that date.

flexibility to tailor their information programs to their systems' circumstances. Finally, some aspects of our program require clarification.

81. In considering petitioners' statements with respect to input selector switch costs, we recognize that the rules as adopted may impose substantial financial burdens on cable operators. These rules not only would require cable systems to bear all of the costs associated with equipment and installation for new subscribers, but also would require them to provide switches in cases where subscribers might not want them. We also note petitioners' point that the rules would require switches to be provided in areas where there are no broadcast signals available off-the-air, such that the switches would serve no useful purpose.

82. In addition, upon further reflection on this issue, we find that the rules tend to limit incentives and flexibility for cable operators to provide a range of switching equipment to meet varying subscriber preferences and to ensure better switch compatibility with video peripheral equipment, such as VCRs, and specific video equipment features. By requiring that switches be provided at no charge or at cost, the rules reduce cable operators' economic incentives to offer switch options with premium features, such as electronic operation or remote control capability, or to offer upgraded terminal/converter devices that include built-in switches. Subscribers will be more likely to maintain and use independent off-the-air reception capability if the associated input selector devices are compatible with their needs and otherwise convenient to use. Moreover, the record demonstrates that there are other advantages to the more expensive electronic switches, including longer lifespan and better isolation. Obviously, cable operators may not desire to provide these switches free of charge.

83. In view of these considerations, we are adopting substantial revisions to the input selector switch require-

ments that are generally consistent with the approach suggested by CCTA. Under the revised rules, cable systems will be required to offer switches to new and existing subscribers, but will be permitted in all cases to charge for the purchase or lease of switches and associated hardware. In addition, cable systems will be permitted to charge for installation of switches for existing subscribers. There will be no "at cost" restriction on pricing of either the equipment or its installation for existing subscribers. However, cable systems will not be permitted to charge an additional fee strictly for installation of switches for new subscribers. We believe the incremental labor necessary to include a switch along with installation of other equipment for new subscribers is minimal and that to provide installation at no additional charge will assist in encouraging new subscribers to acquire a switch. Cable systems will be required to make an affirmative switch offer to their subscribers in accordance with our original plan; however, the rules also will include language to clarify that subscribers may decline the switch offer and are not otherwise obligated to install or maintain off-the-air reception capability. Also, we wish to clarify that consumers may use switches and associated hardware obtained from sources other than their cable system. We believe this will provide a proper competitive balance in the marketing of input selector equipment to limit the price of switches. We are making these changes in order to encourage flexibility in the range of switch options available to subscribers, so that we do not inadvertently encourage use only of the non-state-of-the-art mechanical "A/B" switch, and in order to greatly reduce the financial burden imposed on cable operators. By this change, not only will cable operators not be responsible for bearing the costs of switches and their installation, but they will not be required to provide switches To subscribers who do not need them, for example, because their reception of off-the-air signals is weak or non-existent.

84. We agree with petitioners who argue that there is no need to require input selector switches or consumer education in areas where there are no broadcast signals available off-the-air. Accordingly, we will exempt cable systems that are located in such areas from any requirements under the rules adopted in this proceeding. The most reliable general indicators of whether a broadcast station's signal is generally available off-the-air in a particular area are its Grade B predicted contour and whether it is "significantly viewed" in the cable community.[57] These are the indicators of available off-the-air signals we adopted for use in determining whether cable systems are subject to effective competition for basic service as part of our implementation of the Cable Communications Policy Act of 1984 in MM Docket No. 84-1296.[58] These two indicators are also appropriate for use in determining signal availability for purposes of the exemption from the switch and consumer education rules. The Grade B contour of a station is the standard relied on to determine expected service areas. Also, we recognize that in many cases, a television station's signal may be viewable off-the-air at distances beyond its Grade B contour. In the latter case, reception of the station's signals is generally less reliable with ordinary roof-top antennas and may require special equipment. Areas beyond a station's Grade B contour where its signal is available with ordinary equipment or where the population has tended to install Special antennas and other equipment necessary to ensure reliable reception can

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[57] As defined in Section 76.5(k) of our rules, a station is significantly viewed if its audience in noncable households meets or exceeds the following levels: 1) for full or Partial network affiliated station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and, 2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. *See* 47 CFR §§76.5(k) and 76.54.

[58] *See Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985).

be identified by whether the station is significantly viewed in the area. Thus, the rules will exempt any cable system serving a community where no portion of that community is within the predicted Grade B contour of at least one full service broadcast television station or a noncommercial educational translator station eligible for must carry status and no such stations are significantly viewed in the county in which the cable community is located.

85. There also may be situations where the Grade B contour of one or more broadcast stations overlaps all or a portion or the cable community, yet the signals will not be viewable in that area due to terrain shielding or other factors. In such instances, the cable system operator may submit showings and engineering studies that the signals are not available anywhere within the cable community. Such submissions shall include studies made in accordance with Section 73.686 of our rules.[59]86. We also recognize that there may be instances where a new broadcast station, existing broadcast station with newly upgraded facilities, or existing station that becomes significantly viewed will provide service to a community served by a cable system previously exempt from the rules. Where such a situation occurs prior to the expiration of the five-year transition period, the cable system at that time will be required to comply with all aspects of the rules as adopted in this proceeding. Where such a situation occurs subsequent to the expiration of the transition period, the cable system will be required to comply only with the consumer education rules that continue beyond the five year period.

87. We also acknowledge the concern expressed by some petitioners that the available supply of input selector switches may not be adequate to enable cable operators to begin providing switches to new subscribers within 30 days of the release of the instant decision, when the rules

[59] *See* 47 CFR §73.686.

would become effective, as stated in the *Order* staying their effective date.[60] We recognize that the production and distribution systems for supplying input selector switches and associated equipment may need some time to catch up to the increased demand for this equipment and to meet the switch technical standards to be adopted pursuant to the proceeding will initiate shortly as discussed below. Additional time also would enable cable operators to more fully plan their activities for complying with the new rules. Accordingly, the requirement for offering switches to new subscribers will be delayed for six months after the effective date of these rules in the same manner as the requirement for offering switches to existing subscribers. However, cable operators will be required to inform new subscribes at the time of installation of service of the need to maintain off-the-air reception capability and to provide the other information required by the consumer education requirements immediately upon the effective date of the rules.

88. In considering the signal leakage issue discussed above, we recognize that there may be some cases where consumers install switches improperly or switches fail and signal leakage results. Cable systems will be responsible for detecting and eliminating signal leakage in excess of the standards set forth in Sections 76.605 and, after its July 1, 1990 effective date, 76.611 of our rules resulting from input selector switches regardless of whether the switches are owned or installed by subscribes. Cable systems already are required to conduct systematic performance checks of their facilities under Section 76.601 and, thus, this requirement will not substantially alter the regulatory burden on able operators. Moreover, the typical cable subscriber does not have the technical expertise or equipment to detect signal leakage. We also recognize the importance to life and safety of preventing signal leakage

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[60] *See Order supra* at n. 3.

on the aeronautical frequencies and that in general cable systems will be the only entities qualified and equipped to detect Such signal leakage. Cable operators' responsibility in this regard will be limited to the minimum necessary to detect and eliminate signal leakage in excess of that permitted under the rules. In cases where such leakage occurs, cable operators will be required only to disconnect or, if ultimately necessary, discontinue service to the subscriber until the leakage problem is corrected. Cable operators will not be restricted from charging for services and hardware associated with correction of switch leakage, including the replacement, repair, or proper installation of the switching equipment.

89. As indicated above, we do not want the revised switch requirements to provide cable systems with economic advantages that might permit them to charge excessive prices for switches and installation or otherwise to be less attentive to consumer needs in this area. As an additional measure to limit this advantage, it is necessary to include provisions in the consumer education rules to require cable systems to include as part of their program a statement that switches may be obtained from other suppliers. Cable systems also will be required to indicate that there are a range of possible switch options, including, for example, simple cable/broadcast manual, multiple source input switches, electronic switches, remote control switches, and receivers with built-in switching functions. They will further be required to state that the list of switch options indicted is only representative of those that may be offered and that other options also may be available.

90. In view of the importance of consumer education to the achievement of our goal of correcting viewers' misperceptions about the need for independent access to off-the-air broadcast signals, we plan to maintain the consumer education program as a continuing requirement beyond the five-year transition period. However, we recognize that this requirement imposes some burden on cable op-

erators. Therefore, we would expect to revisit the need for continuing the consumer education requirement as part of the proceeding announced in the *Report and Order* and which we plan to complete prior to the expiration of the transition period, to determine whether there are particular situations where must carry rules might continue to be necessary.

91. We believe this revised approach effectively will eliminate the major portion of the financial burden imposed on cable operators by our original decision. It also will eliminate the requirement for switches to be provided in situations where they would not be used. In addition, the revised switch requirements will provide cable operators with the incentives and flexibility to offer a wider range of switch options to meet varying consumer needs. These rule modifications will not compromise our objectives To change consumers' misperception of the need for maintaining access to off-the-air broadcast signals and to assist consumers in obtaining or reestablishing that access. Our objective of correcting this misperception will be achieved so long as consumers are made aware of the need for independent access to broadcast signals through the consumer education program, are provided an affirmative opportunity to obtain a switch, and are provided sufficient time to reinstall an antenna if they so wish. Our revised approach in fact will enhance the effectiveness of our overall program by aligning it more closely with the reality of market forces. In this respect, the revised rules will rely on market forces, as represented by consumer decisions on whether to obtain a switch and the type of switching equipment they need or prefer, to determine both the pattern of switch penetration and the type of equipment that is used.

## TECHNICAL STANDARDS FOR INPUT SELECTOR SWITCHES

92. Gill Industries, Inc. (Gill), operator of a cable system with dual cables utilizing A/B switches for cable selection argues that we should adopt specific technical standards for input selector switches. Gill submitted the results of a study completed on December 30, 1986, wherein the interference effects of A/B switches were examined. Gill examined switches in both subscribers' homes and in the lab. It states that using switches to connect antennas to its system in many cases caused noticeable, objectionable interference to the reception of cable signals by subscribers and to the reception of off-the-air TV signals by non-subscribers. Gill further states that use of antenna/cable input selector switches will probably cause signal leaks which will raise its cumulative leakage index above the limits established by Section 76.611 of the Commission's Rules. Finally, Gill submits that in homes equipped with outdoor antennas, the antenna/switch isolation must be at least 80 dB to avoid individual leaks that will exceed the 20 uV/m standard for cable systems imposed under Section 76.605(a)(12) of the Rules. It states that by its tests, it found that in approximately 50 percent of its installations the addition of a switch and antenna will result in only 45-50 dB of isolation. Gill claims that its tests demonstrate that the input selector switch rules as now structured will result in significant signal reradiation, which is incompatible with the maintenance of a clean Rf environment for off-the-air TV reception, and with the Commission's policy of protecting aeronautical navigation and communications frequencies.

93. Gill therefore requests that the commission modify its input selector switch rules to: 1) require all equipment connected to a cable system to meet the signal leakage limits now in the Commission's Rules; 2) require, in the case of new subscribers, that cable operators connect an

input selector switch to the cable system and to an off-the-air antenna, with the subscriber's consent, at cost, using equipment that meets Part 76 standards; 3) require all input selector switches and their connections to meet an 80 dB isolation standard; 4) permit only coaxial antenna cable to be used in the case of rooftop antennas; 5) permit use of only "rabbit-ear" antennas with coaxial cable downleds, given their relative radiating inefficiencies and the short length of the connecting wire; and, 6) permit cable operators to install input selector switches in the homes of existing subscribers who request a switch, at reasonable cost, using equipment that meets Part 76 standards.

94. We continue to believe that the technical standards applied to TV interface device transfer switches as set forth in Section 15,606 of the Rules are sufficient to ensure that properly connected input selector switches do not cause interference to cable or off-the-air reception or otherwise permit harmful signal leakage.[61] These standards were established in earlier Commission proceedings[62] and, in view of the fact that no interference complaints have been filed with this Commission that have been lined to switching devices, the existing standards appear to be sufficient to provide the level of isolation necessary to protect against interference. However, we recognize the concerns expressed by Gill and others in this proceeding for possible interference, particularly on the aeronautical communications and navigation frequencies, that might result from use of switches that are inadequate to prevent significant signal reradiation. We find that the important nature of this issue warrants the provision of additional opportunity for interested parties to comment and to submit evidence. Accordingly, we will issue a separate Notice of Proposed Rule Making to consider standards for input selector

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[61] 47 CFR §15.606.

[62] *See Report and Order* in Docket No. 19281, 38 FCC 2d 430 (1972).

switches used to alternate between cable and broadcast television service. This new proceeding will be limited to issues associated with technical standards for broadcast/cable input selector switches. We intend to complete this proceeding in an expeditious manner in order that manufacturers will be able to supply switches in accordance with the scheduled implementation of the new rules as set forth herein. Consistent with this action, we vacate the new Section 76.66(b) adopted in the *Report and Order* which would have required that all switches used to select between broadcast and cable service comply with the technical standards of Section 15.606(a) of the rules.

## REVISIONS TO THE CONSUMER EDUCATION REQUIREMENTS

95. In their joint supplemental petition, NCTA and CATA request that the Commission revise the information statement requirement now set forth in Section 76.66(c) of the Rules. This rule section prescribes the consumer education information that cable operators are required to provide to new subscribers at the time of installation, and to all subscribers on an annual basis. Under the new rules, as adopted in the *Report and Order,* this information statement must consist of a brief, general description of the Commission's signal carriage rules and the purpose of input selector switching devices, followed by a list of the local broadcast stations not carried by the system and the name and telephone number of a contact person representing the system. NCTA and CATA specifically object to the requirement that all local broadcast stations not carried by the system be contained in the information statement. NCTA and CATA state that the term "local broadcast station" is nowhere defined and will cause uncertainty among system operators about which stations are to be included. Additionally, any such list, NCTA and CATA maintain, will inevitably be overinclusive, underinclusive, or both, due to the locations of particular sub-

scribers and changes in the list during the year due to stations signing on-the-air or going dark. NCTA and CATA also object to the inclusion of specific suggested wording for the consumer education program as "regulatory micromanagement" virtually certain to cause confusion among operator and their subscribers. In place of the current requirement, these petitioners suggest that systems merely be required to supply their subscribers with general information about the Commission's rules and the availability of broadcast signals over the air. Specifically, systems would be required to notify their subscribers that: 1) under Federal regulations, the system must carry a certain number of local broadcast signals; 2) systems may choose to carry additional broadcast signals; 3) there maybe other local broadcast stations not carried by the system that could be received off-the-air with appropriate equipment; 4) 'appropriate equipment' may include an off-the-air antenna and/or an input selector switch; 5) in the event of an equipment outage, antennas and switches also can be used to receive some or all of the broadcast stations carried on the system; and, 6) more information on the availability of off-the-air reception to a particular location can be obtained from a television station, an antenna supplier, or an electronics store.

96. Spanish International Communications Corp. and Spanish International Network (SICC) generally applaud the Commission's consumer education program. SICC believes that this approach satisfies the interests of consumers, safeguards the First Amendment rights of cable operators, and ultimately will work to maximize viewer choice through the workings of the marketplace. However, SICC observes that consumer education is only as successful as the ability of consumers to understand the information being disseminated. Therefore, SICC urges the Commission to require cable systems to provide consumer education notices in English and in a foreign language in communities with sizeable foreign-language speaking pop-

ulations. As a means of determining whether such a population exists, the Commission should look to the existence of a full-time foreign language television station. To ease the administrative burden, cable systems could rely on the local foreign language station to provide accurate translations of the consumer education notice, and SICC thinks the Commission should encourage dialogue between cable operators and television station managers to facilitate this effort.

97. In view of the changes we are making with respect to the basic provisions of our policy as discussed above, it is necessary to make a number of changes in the consumer education requirements. We agree, moreover, with NCTA and CATA that the current specification of the consumer information requirements in the form of specific suggested language in the rules may inhibit a cable system's understanding as to the flexibility in presenting the required information in the manner that best suits its particular situation. Accordingly, we are revising the rules to state the consumer education requirements in general terms.

98. However, we are not persuaded that we should eliminate the requirement for cable systems to identify available off-the-air full service station signals that they do not carry. Such identification is necessary for consumers to know which signals they will need to access off-the-air. In examining this requirement, we find that certain clarifications are necessary. We recognize that the rules, as adopted, did not define "local broadcast" for this purpose. It is our intention that subscribers be made aware of all signals that *may* be available to them off-the-air but are not carried on their cable service. This is consistent with our stated goal of maximizing viewer access to program services. We believe that criteria to be used in determining off-the-air signal availability for exemption from the two-part program requirements, i.e., predicted Grade B contour and significantly viewed, also are appropriate for de-

termining signals that may be available for purposes of the consumer education program. Accordingly, cable systems will be required to list those broadcast stations they do not carry whose predicted Grade B contours overlap any portion of the cable community or are significantly viewed in the county. Cable systems will not be required to notify subscribers of changes that occur throughout the year in the stations that maybe available off-the-air and not carried. Rather, the identification of such stations will be part of the annual consumer education requirement and will be required to be current to within one month of the date the annual distribution of that information. The rules also are modified to provide that such stations be identified by both call sign and channel number. This will ensure that subscribers are able to recognize the listed stations.

99. Under the consumer education requirements we are adopting, cable systems will have flexibility to provide the required information in foreign languages and, where it is warranted, should have the incentive to do so in order to be responsive to subscribers' needs. We do not find it is necessary to require cable systems to provide consumer education in both English and a foreign language in communities with sizeable foreign language speaking populations.

100. The following is a summary description of the revised consumer education requirements. Cable systems will be required to inform their subscribers, on an annual basis, that: 1) for the next few years, they may not be required to carry all broadcast signals available off-the-air in the community; 2) after FILL IN EXPIRATION DATE They will no longer be required to carry any broadcast signals; and, 3) it may be necessary to use an antenna in conjunction with an input selector switch up access broadcast signals available off-the-air and not carried by the cable system. In addition, cable systems will be required to describe the function of an input selector switch, explaining the differences between mechanical and electronic switches,

and the fact that use of either type of switch will aid the viewer in obtaining independent access to off-the-air television service. Further, cable operators will be required to inform subscribers that a range of input selector switches may be obtained from sources other than the cable system. Finally, cable operators will be required to identify by call sign and channel number any broadcast television signals that may be available off-the-air in their community that they do not carry.

101. This consumer education information must be provided to all nw subscribers at the time of installation of the cable service and to existing subscribers that do not have input selector switches within six months after the effective date of the new rules and thereafter on an annual basis. This will be a continuing requirement that will not expire at the end of the five year transition period. This annual consumer education requirement and the annual input selector switch offering may both be satisfied by including the information in monthly subscriber billings or other mailings.

## REVISIONS TO THE INTERIM MUST CARRY RULES

102. Numerous petitioners seek clarification of, and suggest modifications to, specific provisions of the interim must carry rules, including the standards for qualified status, the definitions of tier of cable service and useable activated channels, the nonduplication, sunset and dispute resolution provisions, the provisions respecting carriage rights of noncommercial educational stations, commercial and noncommercial translators and satellite stations, and the exceptions for carriage and copyright payments.

### Qualified Stations

103. *Viewing Standard.* Several petitioners address the requirement that in order to qualify for must carry status, commercial broadcast stations (other than "new stations") must attain at least an average share of total viewing

hours of two percent and a net weekly circulation of five percent in noncable households in the county where the cable system is located.

104. INTV seeks clarification of the viewing standard to recognize the carriage rights of stations for which "television survey season" ratings as defined in Section 76.55 of the rules are unavailable because adequate numbers of complete diaries are not returned by noncable television households. It proposes that Section 76.55 provide that once a station achieves qualified status for mandatory cable carriage eligibility, the station then maintains that status until a county coverage report containing adequate audience measurement data for a survey season shows that it no longer meets the viewing standard. INTV also proposes that in cases where adequate ratings data has never been available for a station, the station be permitted to utilize a special survey conducted by an independent audience survey organization that follows a methodology comparable to that used by recognized ratings services such as Arbitron and Nielsen.

105. While published audience data is available or nearly all broadcast stations, we recognize INTV's point that broadcast stations in the few areas where published audience survey data are not available would face a considerable burden in demonstrating that they meet the viewing standard on an annual basis. We find it desirable to permit broadcast stations to qualify for carriage rights for the remainder of the transition period once they initially demonstrate that they meet the viewing standard. However, we believe it is necessary balance this presumption of qualification with a means to permit cable systems to cease carriage of a station that no longer meets the viewing standard. On this basis, we are amending the qualifying station provisions to specify that stations are not required to reconfirm that they meet the viewing standard on a regular, recurring basis. However, at any time after one year from the time a station demonstrates that it meets

the viewing standard, a cable system may nullify the station's must carry eligibility if it demonstrates, using the methodology specified in Section 76.55 of the rules, that the station no longer meets the viewing standard. In response to INTV's request concerning special audience surveys, we observe that the rules, as adopted, plainly indicate that stations may utilize such special audience surveys to demonstrate that they meet the viewing standard.

106. Adelphia seeks modification of the viewing standard to allow for the use of community-specific audience measurement data in establishing or rebutting a station's status as "qualified". Adelphia claims that the use of such data would further the interests of the viewing public by qualifying stations in communities Where they actually have substantial viewership but might be unable to meet the two percent/five percent standard on a county-wide basis due to geographical factors such as size and terrain conditions. In addition, it asserts that use of a community-specific survey would relieve cable operators of the obligation to carry stations that do not have significant viewership and whose carriage would thwart viewer preference. We do not believe it is desirable to allow the use of community-specific data to measure audience data for viewing standard purposes. As indicated above, the regularly published reports of the major audience ratings services generally provide a convenient means for nearly all stations nationwide to demonstrate whether they meet the viewing standards. We believe that to permit use of community-based audience studies would not further the purposes of the interim must carry rules. Rather, to allow use of such surveys likely would result in widespread increased survey efforts on the part of both broadcasters and cable operators that would be costly and, thereby, would have the effect or subjecting the affected parties to unnecessary additional burden. Moreover, we believe that the requirement that qualifying stations deliver a good quality signal

to the principal cable headend will suffice to limit carriage to those actually receivable off-the-air.

107. Lincoln Broadcasting Company (Lincoln), the licensee of station KSTF-TV, requests that the viewing standard be modified to exempt any commercial station that certifies it broadcasts foreign language programming during at least one-third of the hours of an average broadcast week and one-third of weekly prime time hours. It states that the survey Services and methods prescribed by the new rules do not accurately measure foreign-language speaking viewership and, thus, without this exemption, foreign language programming stations will not be able to establish qualified status. Lincoln asserts that the use of special surveys to measure these audiences is prohibitively costly and subject to challenge based on methodology. It states that even if these hurdles could be overcome, stations would be unable to meet the viewing standard requirements until they have completed a full year's cycle of special surveys. Thus it requests that if its proposed exemption is not adopted, foreign language stations should be exempt from the viewing standard for at least one year from the effective date of the rules. Lincoln also requests that in the event the Commission elects not to change its rules in either of the above manners, that its petition be construed as a request for special relief regarding the viewing standard aspect of the interim must carry rules.

108. In developing the criteria for qualifying stations, we carefully crafted the new rules to avoid special carriage rights for stations based on their programming. Such preferred treatment tends to conflict with the strict content-neutral requirements of the First Amendment with respect to regulation that furthers a substantial governmental interest. We believe that to provide an exemption for foreign language stations from the viewing standard as requested by Lincoln would create a content-based provision of the type it is necessary to avoid. Moreover, we do not believe that such a general exception is essential to our objective

of preserving the commercial broadcast system as a competitive alternative source of programming during the transition to an environment without must carry rules. We also believe that the modifications to the viewing standard procedures we are making herein, as discussed above, will reduce the burden on stations that can only demonstrate that they meet this standard through special surveys. Lincoln's alternative proposed basis for special carriage rights— its difficulty obtaining the necessary viewer showing— thus also does not persuade us that different carriage rights are warranted. Accordingly, we are denying Lincoln's request.[63]

109. Adelphia believes that the definition of qualified station unconstitutionally limits the editorial discretion of cable operators located near foreign borders by making stations licensed by foreign governments ineligible for qualified must carry status. It also claims that to deny qualified status to foreign stations frustrates the viewing preferences of cable subscribers. Adelphia illustrates the problem as one facing cable systems located near foreign borders where their channels are occupied such that not all qualified stations are being carried. It states that in order to meet their must carry obligations, such cable systems may be forced to drop stations now carried that meet the mileage and viewing standards, but do not qualify for mandatory carriage because they are licensed by a foreign government. Adelphia requests that carriage of foreign-licensed stations which in all other respects satisfy the

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[63] Lincoln also requests that in the event the Commission elects not to change its rules in either of the above manners, that its petition be construed as a request for special relief regarding the viewing standard aspect of the interim must carry rules. We have decided not to rule on Lincoln's request for special relief as part of the instant Memorandum Opinion and Order, but will instead consider this request in a separate action. Our action herein is not intended to prejudge our separate action on Lincoln's request for special relief.

qualified station standard count toward fulfilling a cable system's required must carry complement.

110. At the outset, we observe that we crafted the interim must carry rules so as to require that only a limited portion of a cable system's channel capacity be devoted to mandatory signal carriage obligations. We believe, as discussed in the *Report and Order* and above, that these provisions are consistent with the *O'Brien* standard. Thus, the interim rules do not preempt cable operators' discretion to carry other video program services such as station licensed by foreign governments. Moreover, we believe that cable operators' editorial discretion is sufficient to ensure that they are able to tailor their mix of program services to meet subscriber preferences. In addition, the federal interest in ensuring that the broadcast television industry remains a competitive source of alternative programming during the transition period does not extend to service provided by stations licensed by foreign governments. The Communications Act nowhere contemplates access to foreign stations as an element of the national communications policy.

111. NITC believes that the viewing standard should be deleted on the grounds that it establishes unconstitutional classification preferences. It states that the viewing standard is a "popularity test," which, on the basis of ratings, subordinates the rights of one group, the less highly rated, to those of another group, the more highly rated, in violation of the First Amendment. NTIC claims that the viewing standard will cause particularly great harm to independent local stations that have to compete for audience with the often duplicative programming of distant broadcast stations or non-broadcast cable networks. NITC also states that similar harm would befall minority broadcasters who serve smaller audiences that are not measurable by the prescribed methodology but are significant nonetheless. It also asserts that the viewing standard fails to specify certain methodology requirements and, thus, it is imper-

missibly vague. SICC also believes that the viewing standard should be deleted from the interim must carry rules. It claims That the viewing standard, as measured by commercial ratings services, does not accurately reflect foreign language television viewing. Thus, SICC states that elimination of the viewing standard would avoid its discriminatory impact on eligibility for mandatory carriage in a manner more consistent with the First Amendment concerns of the *Quincy* court.

112. We reject petitioners' arguments that the viewing standard is unconstitutional and should be deleted from the interim must carry rules. The viewing standard does not establish classification preferences, but instead ensures that viewer program choice is reflected in the transitional period. As we stated in the *Report and Order:*

> [T]he economic effect of the rules on any individual station is not our primary concern. On the contrary, requirement that failing stations be carried might be inimical to the public interest, in that we might well be requiring cable systems to carry stations the public did not want to watch, thereby preventing the cable system from offering a program service the viewers preferred. This would run directly counter to the *Quincy* court's concern that our former must carry rules were unresponsive to consumer preference.[64]

Further, we continue to believe that the viewing standard is an accurate and appropriate means for identifying those stations that consumers prefer to watch. NITC, Lincoln, and SICC have not provided any evidence to persuade us that minority or foreign language audiences are unmesurable. Accordingly, the viewing standard, as adopted in the *Report and Order,* will be retained as part of the interim must carry rules.

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[64] *Report and Order, supra* at 895, n. 170.

113. In their supplemental petition, NCTA and CATA request that Sections 76.5(d) and 76.55 of the new rules be clarified to reflect the language in the *Report and Order* providing that commercial broadcast stations must meet the viewing standard for the *previous* television survey season. Reference to the "previous" television survey season was inadvertently omitted from the rules. Accordingly, the rules will be revised to correct this omission.

114. NCTA and CATA also object to the exemption of new stations from the viewing standard for 12 months following the date on which they begin operations pursuant to program test authority, and the "grandfather" provision for stations which commenced operations after July 19, 1985. They claim that these provisions do not pass constitutional scrutiny on the grounds that by creating long exemption periods, the rules are not sensitive to viewer preferences and unduly burden nonbroadcast cable services which must compete for cable carriage. NCTA and CATA seek modification of these provisions in accordance with the joint industry agreement proposal that new stations be permitted to satisfy the viewing standard by means of a special survey taken at anytime prior to completion of the first full television survey season following commencement of operations. They also request clarification that a station can be considered "new" only once and, thus, operational modifications such as increases in power and changes in antenna design and transmitter location, do not transform existing stations into new station for purposes of the interim must carry rules.

115. In the *Report and Order*, we indicated that we found it necessary to exempt new stations from the viewing standard in order to afford them an opportunity to gain a foothold in the market, thereby furthering our interest in maximizing program choices. We disagree with NCTA and CATA that the one year exemption for new stations and the extension of this exemption to stations commencing operation after July 19, 1985, are unconsti-

tutional. These provisions are not content-based and are narrowly tailored to further our interest in maximizing consumers' program choices. The one year period will afford new stations a reasonable period of time in which to stabilize its operations and to establish an audience for its programming. We do recognize petitioners' concern that operational changes by stations might appear to requalify them for "new" station status. Accordingly, we wish to clarify that stations will be eligible for "new" status only once, upon commencement of their initial program test authority. A major change in facilities will, therefore, not qualify a station for "new" station carriage rights.

116. WLIG requests that the exemption of new stations from the viewing standard be expanded. It argues that such stations do not have the viewership or financial ability to secure carriage on cable systems that may choose from among more than seven qualified signals to meet their must carry requirements. WLIG also contends that new stations need the fair opportunity that cable carriage can provide to help them survive in the currently unbalanced television market environment. Thus, it requests that the rules be modified to define as "new" those stations that began operations for the first time after January 1, 1983, and to require cable carriage of such stations for the full interim period of five years. WLI states that this definition of "new" would include approximately 96 commercial stations and that the five year period coincides with The interim period needed to achieve maximum diversity by reliance on market forces.

117. As indicated above, we believe that the exemption of new stations from the viewing standard is a necessary means to further our interest in maximizing viewers' program choices. However, we disagree with WLIG's argument that this exemption should be expanded. As indicated above, the one year period provides a reasonable amount of time for new stations to gain a foothold in the market. After this time a station and its programming can be

expected to overcome the initial hurdle of becoming familiar to potential viewers such that the size of its audience will be a reflection of the appeal of its programming rather than its new entry to the market. A one year limit on the exemption from the viewing standard also is consistent with our concern for minimizing the intrusiveness of the interim must carry rules on cable operators' First Amendment rights. Moreover, it is appropriate to extend this exemption to stations new as of July 19, 1985, the date of the *Quincy* decision, to provide cable subscribers an opportunity to become familiar with stations that may not have been carried after the former must carry rules were ruled unconstitutional. To grant this exemption to stations new prior to July 19, 1985, is unwarranted as such stations would have been entitled to carriage under the former must carry rules.

118. *Definitions.* WLIG also requests that use of the principal headend of the cable system as the reference point for calculation of the required 50-mile zone be replaced with a "home county carriage" provision, under which cable systems first would be required to carry stations licensed within the county to which the cable system is franchised as part of their 25 percent must carry complement. WLIG states this definition would prevent cable systems from circumventing Commission intent and frustrating the statutory purposes of local franchising by designating a particular headend as "principal" in order to reduce the number or makeup of broadcast stations within the 50-mile zone.

119. We are not persuaded that we should adopt WLIG's "home county carriage" approach as an alternative to use of the cable system's principal headend as the geographical reference point for signal carriage requirements. In this respect, we continue to believe that use of the principal cable headend as the designated reference point is the most appropriate means for determining signal carriage obligations. We are aware that many cable systems operate

multiple headend facilities and that it may be possible in some cases to choose a particular headend as "principal" in order to limit the number of broadcast stations eligible for must carry status. However, we believe it is important to provide cable operators with flexibility in this area an entrust to them responsibility for choosing their principal headend in a manner consistent with the spirit of the interim rules. Thus, we will continue to permit cable operators to use their discretion in designating their system's principal headend. While we expect cable operators will exercise this discretion in good faith, we will investigate and consider appropriate action on a case-by-case basis Where cable operators appear to be abusing this discretion by designating their principal headend so as to avoid signal carriage obligations.

120. Several petitioners request modifications to the rule providing that cable systems are required to carry qualified signals on their "lowest-priced Separately available tier of service." The Corporation for Public Broadcasting (CPB), the National Association of Public Television Stations (NAPTS) and the Public Broadcasting Service (PBS), filing jointly [CPB], and INTV request that the Commission clarify that when must carry signals are carried on a tier requiring use of a converter to receive qualified broadcast signals, the converter must be available at no cost additional to that charged for the lowest-priced tier which does not require use of a converter. CPB also requests clarification that where program services are available on separate tiers at a cost lower than the basic programming tier that includes broadcast stations, such "add-on" tiers do not qualify as a permissible must carry tier.

121. In a similar vein, Adelphia objects to the lowest-priced separately available tier definition on the grounds it does not take into consideration cable operators' need for flexibility to offer separately available multi-pay package of the add-on type described by CPB. It requests the rule be modified to define "tier" as "two or more video

program services which are not otherwise available individually." Adelphia states that this definition would ensure that qualified stations are carried on a tier of service most likely to have the widest distribution to cable subscribers and that cable operators would have maximum flexibility to package and market non-basic services in a manner most responsive to marketplace demands. WLIG also opposes the "lowest-priced" definition on the grounds it is subject to potential abuse. It states that cable operators could create a separate tier that included only must carry broadcast signals and price it slightly below the cost of the "true" basic tier which would include broadcast signals, satellite networks, and other services. Must carry signals that the cable operator did not want to provide its subscribers would not be carried on the slightly higher-priced tier. Subscribers effectively would be denied access to the full complement of must carry signals because they would not be willing to pay the price of a full tier of service to obtain access to only a few additional signals. WLIG states that this problem could be avoided by use of the already defined phrase "basic cable service" or by substitution of the phrase "most widely subscribed" for the phrase "lowest-priced."

122. We recognize that there may be confusion concerning the tier of service on which must carry signals are required to be carried. In the *Report and Order*, it was our intention to require that all must carry signals be provided at no additional cost to subscribers who purchase a tier of service on which any of the must carry signals are carried. Thus, we required that must carry signals be carried on a cable system's "lowest-priced separately available" tier of service. We acknowledge petitioners' concern that this term may permit practices inconsistent with our purposes. Accordingly, we will revise the rules to clarify that if any signals carried in fulfillment of must carry obligations are included on a service tier, then all must carry signals must be carried on that tier.

In addition, all signals carried in fulfillment of a cable system's must carry obligations must be included on the lowest-priced tier separately available to each cable subscriber.[65] The price of this tier of service must include the cost of any terminal device necessary to receive the service. In addition, the tier of service on which the must carry signals are provided must be accessible on any additional receiver connections which the subscriber may purchase.[66] We believe that this rule, as clarified, will ensure that subscribers have opportunity to access all signals carried in fulfillment of must carry obligations during the transition period. Our revised formulation of this portion of the rules will avoid the tiering problems anticipated by petitioners and will provide flexibility for cable operators to their multi-pay packages in a manner that will not conflict with our purposes or the requirements in the Cable Act.

123. Adelphia also objects to the definition of "useable activated channels" for determining cable system channel capacity. It states that the exclusion of only those channels set aside due to potential interference with aeronautical frequencies is inconsistent with The definition of "activated channel" in the Cable Act. In This regard, Adelphia refers to the leased access provisions in Section 612 of the Cable Act which exclude channels "otherwise required for use . . . by Federal law or regulation." Adelphia also requests that the definition of useable activated channels be modified to exclude channels unuseable pursuant to Sec-

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[65] Consistent with our earlier decision in *Monterey Cable TV*, 56 RR 2d, 159, *recon.* 98 FCC 2d 1281 (1984), however, a cable operator may put a must carry signal on a higher tier if the operator notifies it subscribers and offers free converters to all subscribers wishing one in order to watch That must carry signal.

[66] The record does not justify action on additional connections provided to subscribers free of charge at this time. Any party wishing to address further this issue may file a petition for rule making in accordance with Section 1.401 of the rules.

tions 76.610 through 76.618 of our rules concerning the operation of cable systems in the 108-136 MHz and 225-400 MHz bands, as Well as channels subject to direct pickup interference (DPI) resulting from strong local broadcast station signals.

124. We disagree with Adelphia's argument that the definition of useable activated channels in the interim must carry rules is inconsistent with that of "activated channel" in Section 612 of the Cable Act. Section 612(b)(5)(A) defines "activated channels" as:

> . . . those channels engineered at the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or government use. . . .

The definition in the interim must carry rules parallels this definition except that it excludes those channels "whose use for distribution of broadcast signals would conflict with technical and safety regulations," that is, those channels in the 108-136 MHz and 225-400 MHz bands. Thus, it appears that Adelphia argues not that the definition of activated channels in the Cable Act should be used, but rather that useable activated channels should be defined as those available for leased access pursuant to Sections 612(b)(1)(A) and (B). Use of this definition would significantly reduce the base of channels used to determine the maximum number of broadcast signals a cable system is required to carry.

125. The maximum number of signals required to be carried by cable systems, as determined using the definition of useable activated channels adopted, strikes the proper balance between the need to ensure effective competition during the transition period and to minimize the intrusiveness of our regulations on cable operators' First Amendment rights. The change requested by Adelphia

would tilt this balance in a manner contrary to the purpose of the interim must carry rules. With regard to Adelphia's suggestion that we exclude channels subject to direct pickup interference from the count of usable activated channels, we believe that for systems maintaining adequate radio frequency integrity, such interference is likely to be a problem only near an interfering transmitter and does not affect the majority of cable subscribers. It is not necessary to provide a general exclusion for channels on the basis of direct pickup interference. Rather, it is more appropriate to resolve any such problems that might occur on a case-by-case basis. Accordingly, we will not modify the definition of useable activated channels adopted in the *Report and Order.*

**Mandatory Carriage Provisions.**

126. *Duplicating Stations.* The ABC Television Affiliates Association (ABC Affiliates) opposes the interim must carry rule provision exempting from carriage the entire schedule of a station's programming, including both duplicated and nonduplicated programming, of qualified stations affiliated with the same commercial network as another qualified station carried by a cable system. Consistent with its original proposal, station carried by a cable system. Consistent with its original proposal, ABC Affiliates requests that the Commission modify this rule to require carriage of the nonduplicated, but not the duplicated, programming of all qualified stations, including commercial and noncommercial network affiliates and independent stations. It believes that in its current form, the nonduplication provision discriminates against network affiliated stations in favor of independent stations and, thus, violates the First Amendment and the equal protection clause of the Fifth Amendment. It also states that the rule is arbitrary and capricious because it contradict the Commission's stated legal and policy rationales by exempting from mandatory carriage programming that would

maximize program choices, compete for viewers with other eligible broadcast stations and cable program, and meet viewers' interests and preferences.

127. We are not persuaded that we should alter the provisions concerning carriage of stations affiliated with the same commercial network as requested by ABC Affiliates. Carriage of only the nonduplicated portion of an affiliated station's program service would, in practice, require cable systems to devote an entire channel to carriage of such programming. The channel would have to be available at all times when the nonduplicated programming is broadcast. Any other use of this channel by the cable system would be on a secondary basis, in accordance with a schedule controlled by the station. As a practical matter, therefore, it is likely that a cable operator required to carry the nonduplicated portions of affiliates' programming would simply carry the duplicated affiliates in full. Accordingly, we disagree with ABC Affiliates that the requested modification would contribute to maximizing the variety of program choices offered by cable systems. Rather, we believe the necessity of the channel set aside pursuant to the requested arrangement would prevent cable systems from offering another full-time program service on that channel. This result is contrary to the interests of cable operators, cable programmers and the viewers. Further, we disagree that the rules, as adopted, arbitrarily discriminate against duplicating affiliates in favor of independent stations. Carriage of the entire schedule of programming of independent stations allows cable systems to offer a complete schedule of nonduplicated programming that makes full use of the cable channel on which it is carried. In view of these considerations, we are denying the ABC Affiliates' request.

128. We observe that the rules did not reflect our decision in paragraph 153 of the *Report and Order* that where the maximum number of qualified stations is less

than or equal to the maximum number of channels that the system must carry and both a parent and its satellite television stations qualify for carriage, a cable system is not required to carry both stations, but may chose which station to carry. The rules also did not reflect that under the same circumstances, that a cable system is not required to carry both a noncommercial station and its translator if both qualify for carriage. We are amending the rules to correct these omissions.

129. *Dispute Resolution.* INTV seeks to change the two-step procedure for broadcast station signal carriage requests and mandatory carriage dispute resolution adopted in the *Report and Order.* It proposes that Section 76.58(c) be modified to provide that a broadcast station may request a ruling with respect to its demand for carriage by the cable system if it simultaneously files duplicate copies of the carriage demand with the Commission. A cable system receiving such a demand would be required to respond to the station and simultaneously to file such response with the Commission. Under this approach, if the cable system agrees to carry the broadcast station, Commission proceedings on the matter would automatically be terminated. Otherwise, the Commission would treat the filings as pleadings for purposes of resolution of the matter. INTV asserts that this modification would streamline the dispute resolution procedure, thereby permitting more expeditious handling of cable carriage disputes. In considering INTV's request, we find that it is more appropriate to encourage cable systems and broadcast stations to resolve carriage disputes among themselves. Disputes should be brought to the Commission only where the parties are unable to reach agreement after having attempted to do so in good faith. This approach will minimize administrative burdens on the Commission, cable systems and broadcast stations, whereas INTV's approach would encourage parties to invoke formal administrative procedures and to incur the associated legal

costs in cases where the matter could be resolved informally among the parties.

130. In the *Report and Order*, the text at paragraph 158 indicated that a cable operator must respond to a broadcaster's request for carriage with a written response within 30 days, while Section 76.58 of the new rules provided a 15 day response period. It was our intention to provide cable operators with 15 days to respond to a broadcaster's request for carriage. Thus, the text was incorrect. Accordingly, we hereby clarify that cable operators will have 15 days to respond to requests for carriage.

**Noncommercial Educational Stations**

131. Several parties representing public noncommercial educational television interests, as well as NCTA and CATA, address the interim must carry provisions affecting noncommercial broadcast stations. CPB believes that the interim must carry rules inadequately protect the governmental interest in the unique services provided by public television programming. It states that as recognized and articulated by the Commission in the *Report and Order*, the governmental interest in public television is sufficient to justify its original proposal to require cable systems to carry all nonduplicating local public television stations or, at a minimum, to require cable operators to carry all local, nonduplicating public television stations (in addition to those required by the interim must carry rules) where activated channels are not otherwise being used. CPB states that the latter proposal would not impose a burden on cable operators and would facilitate viewer awareness of public stations, thereby enhancing the prospects that they will continue to gain audience and support when the interim period expires. It concludes that the substantiality of the governmental interest in public television resolves any dispute as to the constitutionality of the proposal. In this regard, CPB also requests that Section 76.56 of the rules be modified to include language from the *Order* spec-

ifying that cable systems have to carry "at least" one or two noncommercial stations, and to provide that where a cable system's must carry quota is not otherwise filled, it is required to carry additional local public television station up to its requirement.

132. In a similar vein, CPB proposes lowering the cable system channel capacity cap for carriage of at least two noncommercial stations from 54 or more channels to 25 or more channels. It criticizes the designation of 54 or more channels as arbitrary and submits data to show that under the former must carry rules, 72 percent of the cable headends that carried two or more public television signals had 25 or more channels. CPB further proposes modifying the rules to provide that a public television station qualifies for mandatory carriage if the cable community lies in whole or in part within the station's Grace B contour rather than if the reference point of the station's community of license lies within 50 miles of the principal headend of the cable system. It claims this modification is necessary to reflect the fact that, unlike commercial stations which are generally engineered to provide the strongest possible signal to their community of license, many public television stations are located according to plans designed to provide Grade B service to an entire state or region.

133. On the other Side of this issue, NCTA and CATA seek elimination of the mandatory carriage rights afforded noncommercial stations. They state that these carriage rights, including, for example, the exemption from the viewing standard, treat noncommercial stations in a manner preferential to, and discriminatory of, commercial stations that violates the First Amendment. NCTA and CATA claim that there is no evidence that the availability of noncommercial stations will be endangered if their carriage rights are put on an equal footing with those of commercial stations. Moreover, they state that the justification for such preferential treatment on the basis of the public interest value of the alternative programming provided by

noncommercial stations makes plain that the regulations are content based and, hence, unconstitutional. In this regard, they argue that government funding of public stations does not justify ignoring the constitutional prohibition against interfering with another speaker's editorial judgment.

134. In The *Report and Order*, we recognized that the federal interest includes maintaining access by cable subscribers to the alternative program services provided by noncommercial educational stations during the transition period! Therefore, we adopted distinct provisions for carriage of such stations in the interim must carry rules. In recognition of their unique role in our television system, we extended to noncommercial educational stations certain advantages with respect to signal carriage rights. These advantages are:

1) Noncommercial stations and translators do not have to meet the viewership standards;
2) All cable systems, including those with 20 or fewer channels, must carry at least one qualified noncommercial station or translator;
3) If two or more noncommercial stations are eligible, cable systems with 54 or more channels must carry at least two such stations, if available;
4) Cable systems must carry duplicating noncommercial stations up to the limit of their signal carriage obligations;[67] and,

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[67] The interim must carry rules provide that where the number of qualified stations is less than or equal to the maximum number of channels that a cable system must devote to carriage of off-the-air signals, the cable system is required to carry all such signals. However, cable systems are not required to carry: 1) The signals of more than one station affiliated with the same commercial network; 2) the signals of both a satellite and its parent television station where both otherwise qualify for carriage; or 3) the signals of a parent noncommercial station and its satellite and translator stations. There is no exception permitting

5) Noncommercial educational translators are eligible for qualified status.

In adopting these provisions, we stated that they strike an appropriate balance between the competing needs to provide access to noncommercial educational programming and to protect cable operators' opportunities for exercising their editorial discretion during the five-year interim period.

135. We are not persuaded by petitioners' arguments on either side of this issue that we should alter our initial decision concerning carriage rights for noncommercial stations. Petitioners requesting additional carriage rights for these stations have not demonstrated that the interim must carry rules do not ensure the availability of a reasonable quantum of noncommercial broadcast service to all cable subscribers. On the other side, we do not believe the advantageous treatment afforded noncommercial stations unconstitutionally discriminates against commercial stations, but rather is necessary to further the federal interest in noncommercial educational television service long recognized by this Commission and the Congress.[68] The noncommercial station carriage provisions, as adopted, strike the appropriate balance between the two important and conflicting federal objectives involved in this issue. Ac-

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cable systems not to carry the signals of noncommercial stations affiliated with the same network. Thus, a cable system must carry noncommercial stations that duplicate the same network programming to the extent that the number of qualified stations is less than or equal to the maximum number of channels the cable System must carry. For example, if a cable system were obligated to carry up to eight broadcast stations and there were five qualified commercial stations, no two of which were affiliated with the same network, and three noncommercial PBS affiliated stations, the cable system would have to carry all of these stations. *See Report and Order, supra*, at paragraph 153, and 47 CFR §76.56.

[68] *See Report and Order, supra* at paragraph 117.

cordingly, we will not modify the basic signal carriage provisions for noncommercial educational stations.

136. CPB, Educational Broadcasting Corporation (EBC), and American Christian Television Services, Inc. (ACTS) each request that we delete the rules that make eligible for qualified status only those noncommercial educational stations operating on reserved frequencies and that we extend such eligibility to noncommercial stations operating on nonreserved frequencies. Petitioners argue that the Commission's stated justification for the mandatory carriage rights afforded noncommercial stations is to protect viewers' access to public television programming and, therefore, the rules should encompass all stations broadcasting such programming, regardless of their location on the spectrum. They recommend use of the standards for noncommercial educational stations in Section 73.621 of the rules as the fundamental method of determining the noncommercial status of stations operating on nonreserved frequencies. ACTS alternatively suggests requiring stations to demonstrate nonprofit charitable status as recognized by the IRS pursuant to 26 U.S.C. §501(c)(3).

137. The interim must carry rules exempt otherwise eligible noncommercial educational stations operating on reserved channels from the viewing standard in order that they may qualify for carriage. Further, they specify that each cable system must carry at least one, and in some cases at least two, qualified noncommercial educational stations, depending on its channel capacity. A cable system also is required to carry additional qualified noncommercial signals if the number of qualified commercial stations plus the number of noncommercial stations it is required to carry is less than the maximum number of signals the system is required to carry. In the *Report and Order*, we recognized that noncommercial stations are not subject to the same market forces as commercial broadcast and cable television. Our objective in providing special treatment to noncommercial educational stations was to ensure cable

subscribers' access to noncommercial programming in the transition period and, thus, to protect the federal interest in maintaining the availability of such programming "to all of the citizens of the United States."[69] Upon examining petitioners' position, we recognize that by limiting the exemption from the viewership standard only to noncommercial educational stations assigned to reserved channels, we inadvertently excluded from this exemption those noncommercial stations assigned to nonreserved channels. We also inadvertently failed to specify that the noncommercial station carriage requirements apply only to stations providing such program services.

138. Therefore, we will modify the rules to correct these oversights. The revised rules will provide for extension of noncommercial educational station carriage rights to all noncommercial stations that are the subject of the federal interest, and only to such stations. We believe the most appropriate and convenient means for accomplishing this is to apply the noncommercial station carriage provisions to all stations operating on reserved channels and to provide for their extension to noncommercial stations operating on non-reserved channels on a case-by-case basis. The most useful and effective approach for identifying noncommercial educational stations operating on nonreserved channels that should be eligible for noncommercial carriage rights is to rely on the standards used to qualify stations for the Public Telecommunications Facilities Program (PTFP) administered by the National Telecommunications and Information Administration.[70] This approach provides

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[69] *See* Pub. L. No. 90-129, 81 Stat. 365 (1967); *see also* 47 U.S.C. §§396(a)(5) and (6).

[70] *See* 15 CFR Part 2301.4(a), which provides that "[i]n order to apply for and receive a PTFP grant, an applicant must be: (1) A public or noncommercial educational broadcast station; (2) A noncommercial telecommunications entity; 93) A system of public telecommunications entities; (4) A nonprofit foundation, corporation, institution, or asso-

a more definite standard than the noncommercial eligibility criteria contained in Section 73.621 of our rules. Use of the PTFP standards also will provide an administratively efficient means for determining qualified noncommercial stations operating on nonreserved channels. We observe that noncommercial educational stations operating on nonreserved channels in most cases will already have demonstrated that they meet these standards to obtain PTFP funding. To qualify for noncommercial carriage rights, such stations merely will need to submit proof that they have met the PTFP standards.

139. We also will revise the rules to provide that only stations qualified under the above criteria are eligible for carriage in fulfillment of the minimum noncommercial station carriage requirements. We believe that these modifications will ensure that the service of those noncommercial educational stations which provide statutorily defined "public telecommunications service" will be available to cable subscribers.[71]

140. Television Communications, Inc., requests that the carriage rights afforded to noncommercial stations be extended to religious specialty stations on the grounds that such stations have specialized programming appeal. We are not persuaded to do so. While religious specialty stations, like foreign language stations, provide specialized programming, they are not within the category of noncommercial stations for which Congress and the Commission have identified a unique concern and for which discrete statutory and regulatory treatment has been established.[72]

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ciated organized primarily for educational or cultural purposes; (5) A nonprofit foundation, corporation, institution, or association organized for any purpose except primarily religious to plan for the provision or public telecommunications services; (6) A state or local government or agency or a political or special purpose subdivision of a state.

[71] *See* 47 USC §397(14).

[72] *See* 47 U.S.C. §§396 and 399B; *see also* 47 U.S.C. §§73.606 and 73.621.

In order to avoid regulation broader than necessary to achieve our narrowly stated federal interests, therefore, we believe specialized carriage perogatives should not be extended to specialty stations generally. Thus, we find that Television Communication's request would conflict with our First Amendment objectives. Accordingly, we are denying its request to extend the noncommercial station carriage provisions to religious specialty stations.

141. CPB requests modification of the rule that affords noncommercial station mandatory carriage rights to noncommercial translators of 100 or more watts to extend those rights to such translators operating with 5 watts or more output power. It states that the present 100 Watt limit would exclude 297 of the 930 translators providing public television service, including 224 VHF translators. In addition, it states that the Commission has not explained its departure from its earlier rationale that noncommercial translators of 5 or more watts are such an essential part of the nation's public telecommunications system that they require mandatory carriage status under the former must carry rules. We agree with CPB that such translators constitute an essential part of the noncommercial television system by providing service to areas not otherwise capable of receiving a full service noncommercial station. In such areas, it is important that subscribers to the local cable system be able to access these translators during the transition period. Accordingly, we will revise the rules to make noncommercial translators operating with 5 or more watts output power eligible for qualified must carry status in the same manner as full service noncommercial stations.

**Carriage of Commercial Translators**

142. Hubbard Broadcasting, Inc. (Hubbard) requests that the carriage rights afforded to commercial stations be extended to include commercial translators operating with 100 or more watts. It submits that it is illogical to dis-

tinguish between commercial and noncommercial translator stations for must carry purposes, and believes that the development and maintenance of off-the-air translators in rural areas requires a uniform and comprehensive must carry policy. Hubbard notes that the former must carry rules included such translators, and states that there are still vast areas of the country where the only available off-the-air television service is provided by translator stations. Hubbard also states that to differentiate between noncommercial and commercial translators for must carry purposes based on a determination that the former provide programming of greater public interest value raises serious First Amendment questions. Hubbard asserts that its request would be permissible under the *O'Brien* standard.

143. We do not believe it would be appropriate to afford eligibility for qualified must carry status to commercial translators as requested by Hubbard. Our purpose in providing signal carriage rights to commercial stations is to preserve the commercial broadcasting system as a competitive alternative source of programming during the transition to an environment without must carry rules. The essential aspect of this system is the service provided by full service stations. Translators and low power television facilities provide service that is secondary and supplementary to that provided by full service stations. Achievement of our objectives for the interim must carry rules does not require that we extend must carry eligibility to commercial translators and low power television stations. Moreover, such provisions would be inconsistent with the requirement under the *O'Brien* standard to minimize the intrusiveness of our regulations on cable operators' First Amendment rights.

**Carriage of Other Stations**

144. CPB, NAB, Joint Broadcast Television Petitioners (Joint Broadcast Petitioners), Midwest Television, Inc. (Midwest), and Meredith Corporation (Meredith) each re-

quest clarification as to whether terrestrial satellite television stations, that is, full service broadcast stations that rebroadcast some or all of the programming of a full service television statior, are eligible to qualify for mandatory carriage under the interim must carry rules. In their view, the *Report and Order* and the new rules are confusing on this point. Specifically, petitioners state their belief that because satellite stations operate on channels regularly assigned to their community of license under Section 73.606 of the rules, they are made eligible for qualified status by the incorporation by reference of Section 76.5(b) into the definition of "qualified broadcast station" in Section 76.5(d), as amended. They further state that paragraph 153 of the *Report and Order* supports this view since it provides that "where both a satellite and its parent television station qualify for carriage, the cable system need not carry both stations and may choose between them. . . ." However, they state that this conclusion is confused by langauge in paragraph 144 of the *Report and Order* which includes satellite stations among those stations not entitled to carriage under the new rules. NAB believes that paragraph 144 refers to satellite television stations of types other than those encompassed by Section 76.5(b), such as direct broadcast satellites. These petitioners argue that satellite stations should be eligible to qualify for must carry status.

145. The confusion as to whether terrestrial satellite broadcast stations are eligible to qualify for must carry status stems from an inadvertent misstatement in paragraph of 144 that "satellite stations" are not entitled to carriage under the new rules. This statement is intended to refer to direct broadcast satellite stations and not terrestrial satellite stations. Terrestrial satellite broadcast stations are eligible for must carry status. Inasmuch as the rules, as adopted, plainly reflect this interpretation, revisions thereto are not required.

146. In a similar vein, Joint Broadcast Petitioners also seek clarification that nothing in paragraph 144 is intended to restrict the freedom of cable operators to carry stations such as foreign television stations, direct broadcast satellite stations, low power television stations and commercial translator facilities, which are excluded from eligibility for qualified must carry status. We take this opportunity to clarify that nothing in paragraph 144 or elsewhere in the *Report and Order* is intended to restrict cable operators' freedom to carry programming of stations that are excluded from eligibility for must carry status. Quite to the contrary, our purpose is to increase, to the extent possible, cable operators' freedom to decide what signals they will carry. We will modify the rules to specify that after satisfying their interim must carry obligations, cable systems, to the extent permitted by Commission rules and other legal requirements, may carry any other broadcast stations or program services at their discretion.

**Payments to Cable Systems**

147. NAB, INTV and TOC each request modification of the rule permitting cable systems to receive payments for carriage from stations that either are not qualified or are qualified but are not carried as part of the cable system's complement of must carry stations. These petitioners argue that to permit such payments creates incentives for cable operators to disregard subscribers' viewing preferences and to select stations for carriage to fulfill must carry obligations in a manner that would yield the greatest compensation from other qualified stations. NAB requests that this rule be modified in accordance with the joint industry agreement to prohibit payments by qualified stations whether or not they are carried to fulfill must carry obligations, or by stations that would have been entitled to carriage under the former must carry rules. INTV believes that any payments other than those provided for in paragraph 157 of the *Report and Order* respecting copyright fees and delivery of a good quality signal to the

cable headend should be prohibited. TOC requests that we prohibit payment by any television station as a condition for carriage on a cable system.

148. We reject petitioners' request to modify the rules to prohibit cable systems from receiving any payments for carriage, other than those associated with delivery of a good quality signal and copyright fees, by broadcast stations not carried in fulfillment of signal carriage obligations. We believe that to prohibit such payments would, in fact, distort the operation of market forces in a manner that would disregard viewer preferences. In situations where cable systems are not obligated to carry a particular broadcast station, and a channel is available, there are likely to be alternative program sources competing with the broadcast station to occupy the channel. Under the "no payment" approach requested by petitioners, broadcasters would be at a competitive disadvantage with respect to other program sources in obtaining cable carriage. For example, if a broadcast station and its competitors were equally attractive to the cable system, and the latter were willing to pay for carriage, then the broadcast station would not be able to compete effectively for the channel and would not be carried. Further, even if a broadcast station were more desirable than its competitor, the latter would be able to pay a fee that might outweigh that factor. The result might be that broadcasters not carried in fulfillment of must carry obligations would be harmed if they were unable to pay for carriage. Thus, we continue to believe it is appropriate to permit payments for carriage by stations not carried in fulfillment of must carry obligations.

149. In considering the payments issue, we are concerned that prohibition on "payments" to cable systems by stations carried in fulfillment of signal carriage obligations might be interpreted to apply only to direct, monetary payments. Thus, it might appear that cable systems could arrange for indirect, nonmonetary considerations for

carriage of stations carried in fulfillment of signal carriage obligations. Examples of such indirect payments would be where a station might provide the cable operator with advertising time for the cable system's premium services or where a cable operator might employ channel repositioning to circumvent the intent of our rules and extract payment for carriage. Arrangements for indirect consideration would be most likely to occur in cases where the number of qualified stations is greater than the maximum number of signals that the cable system is required to carry. We emphasize that indirect payments by signals carried in fulfillment of must carry requirements are not permissible. To clarify this point, we are amending the rules to specify that the prohibition on payments to cable systems by stations carried in fulfillment of must carry obligations applies to both direct (monetary) and indirect (nonmonetary) payments.

150. The interim must carry rules permit cable systems not to carry an otherwise qualified station that is considered a distant signal for copyright purposes and to accept reimbursements from a qualified station for any copyright fees associated with the station's carriage. WLIG believes that these provisions artifically exclude many local stations from eligibility for must carry status. It believes the rules should not automatically exclude stations from eligibility for must carry status if they are considered distant signals under the compulsory license scheme. WLIG requests the rules be modified to provide that such stations are eligible to qualify for must carry status, but cable systems, as a condition of carriage, may require them to pay the copyright fees incurred as a consequence of Their carriage. NAB seeks clarification as to the amount of permissible payments. It states that the parties to the joint industry agreement intended to limit such reimbursements to the incremental increase in copyright payments as a result of carriage of a station considered to be a distant signal. Thus, NAB requests that the rules be modified to specify

that the compensation permitted is limited to the costs attributable to any increase in the number of distant signal equivalents in the payment formula under the compulsory license due to the expansion of the carriage radius.

151. We recognize that there is some ambiguity in the provisions respecting carriage of signals considered distant under the compulsory license scheme and payments by such stations as reimbursements for the associated copyright fees. In the *Report and Order*, it was our intention to provide that stations considered distant signals for copyright purposes not be eligible to qualify for must carry status regardless of whether they reimburse the cable operator for any copyright fees associated with their carriage. We disagree with petitioner arguments that "distant signals" should be eligible for must carry status. In this regard, we believe that must carry eligibility for such stations in some instances would impose unnecessary additional carriage obligations on cable systems. Accordingly, we will modify the rules to clarify that broadcast stations considered distant signals for copyright purposes are not eligible To qualify for must carry status. Consistent with this clarification, We also will eliminate the provisions concerning reimbursement payments for copyright fees incurred for carriage of such stations. Thus, stations considered to be distant signals may pay for carriage in the same manner as other stations not carried in fulfillment of must carry obligations.

**Sports Blackout Rule**

152. Adelphia states that the interim must carry rules affect the Commission's sports blackout rule contained in Section 76.67 in such a way as to potentially increase the number of sporting events which cable operators are required to black out. Specifically, it points out that since the interim must carry rules in effect increase the specified zone of a television station from 35 to 50 miles and impose a limit on the number of qualified stations a cable operator

is required to carry, a greater number of cable systems will be affected by any existing sports blackout, while at the same time fewer broadcast stations carrying sports events will qualify for carriage. Adelphia states that as a result, the existing exemption from blackout requirements is narrowed. It believes that this result is contrary to the Commission's longstanding policy of limiting blackout protection to the smallest area necessary to protect gate receipts and ensure attendance. Thus, Adelphia requests that we modify Section 76.67 to provide that the 35 mile zone remains applicable for sports blackout purposes. If further requests that the rule be modified to provide that a cable system need not provide sports blackout protection if a sports event is available live on a broadcast television signal which is being carried on the cable system and which would have been entitled to assert carriage rights under the former must carry rules.

153. In adopting the interim must carry rules, it was not our intention to alter the provisions of the sports blackout rule; nor were changes to it subject to notice and comment. Thus, the changes to this rule resulting from adoption of the interim must carry rules were inadvertent. Therefore, we will modify the sports blackout rule to ensure that the application of the rule remains the same as it was under the former must carry rules. We disagree with petitioners' contention that the interim must carry rules change the applicable specified zone for purposes of the sports blackout rules. The term "specified zone" is defined in Section 76.5(f) of our rules as "[t]he area extending 35 air miles from the reference point in the community to which that station is licensed . . ." This definition is not affected by any action we have taken in this proceeding. However, the reference in the rule to "mandatory signal carriage" is affected because it refers to a specific set of broadcast stations that is altered under the new rules. These same signals also can be referenced by the characteristics that qualified them for must carry status

under the former must carry rules. Accordingly, we are revising the sports blackout rule to eliminate the term "mandatory signal carriage" and to replace it with the characteristics previously used to describe those signals that were entitled to must carry status.

## OTHER POLICY ISSUES

154. Century asserts that the circumstances leading to adoption of the new rules constitute denial of due process. It argues that this proceeding was instigated, perpetuated, and dominated by political activities of an extraordinary nature by Congress. Century asserts that however appropriate such "legislative" activities may otherwise be, the intended, perceived? and actual impact of such coercion upon the independence and objectivity of the Commission's proceedings is manifest. It, therefore, submits that resolution of this proceeding, and especially rulings upon matters of fundamental law, have been unduly influenced by elements irrelevant and extraneous to judicious disposition of constitutional questions and liberties.

155. We find no validity to Century's allegation of impropriety on the part of the Commission in this rule making proceeding.[73] Century has not provided any evidence or documentation to substantiate its claim of the denial of due process. All interested parties were afforded ample opportunity to participate in this proceeding and all the documents received, including correspondence, were placed

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[73] On March 9, 1987, Century filed a "Motion to Vacate Report and Order and for Termination of Proceeding." In this Motion, Century claims that the Commission failed to follow proper administrative procedures and to adhere to prescribed regulations and standards. These are essentially the same arguments that were made in the several pleadings already filed by these parties and that we are rejecting for reasons as discussed herein. We find no new evidence in this filing to bolster Century's earlier arguments. Accordingly, we find no merit in Century's motion and are denying its request to vacate the *Report and Order* and to terminate this proceeding.

in the public record. Further, Century seems to dispute our responsibility, once we determined a need for some form of interim mandatory carriage regulation, to seek a rationale for that regulation that would withstand judicial review. We indicated in the *Report and Order* that must carry rules are needed on an interim basis until consumers become aware of the need to maintain independent access to off-the-air signals and have opportunity to obtain such capability through input selector switches. Yet in formulating such rules, we also were well aware of the Court's basis for invalidating our former must carry rules. Therefore, it was necessary and appropriate to tailor the interim must carry rules such that they will withstand judicial scrutiny.

156. TBS contends that, if we decide not to eliminate the interim must carry rules, then we should stay the effective date of the rules pending a determination by the Court of Appeals on the merits of the TBS petition. TBS submits that, aside from the likelihood that it will prevail on the merits of its position, the potential for irreparable harm to itself and the possibility of harm to other parties and the public interest warrant a stay. It argues that the courts have consistently held that denial, or threatened denial of constitutional rights of freedom of speech and expression, constitutes irreparable harm for the purposes of issuing a stay or injunctive relief. TBS also claims that a stay would cause no significant harm to the other parties to this proceeding. In this respect, it states that a stay would merely preserve the status quo, in which there are not must carry rules and cable operators are free to exercise their discretion to select the programming that will satisfy the needs and interests of their subscribers.

157. We find that it would not be appropriate to delay the effective date of these rules any further, as TBS contends. This proceeding has been exhaustive and lengthy, affording participation by all interested parties and permitting the Commission to carefully consider all possible

alternative approaches. The regulatory program we have adopted is constitutionally and statutorily sound. Also, we do not agree with TBS that a stay pending judicial review is appropriate. TBS claims that denial or threatened denial of constitutional rights of freedom of speech and expression constitute irreparable harm for the purposes of issuing a stay. In our view, the new rules do not unconstitutionally infringe the rights of cable operators. Rather, the new rules balance the need for ensuring consumers' access to off-the-air signals with the rights of cable operators to choose the signals they desire to carry by limiting the number of signals entitled to mandatory carriage. TBS further argues that there will be no significant harm to other parties in this proceeding if a stay were granted. We believe that in the absence of interim must carry rules, consumers would be harmed if they were denied access to local broadcasting service not carried on their cable systems and they have not yet become aware that they have the capability to receive local signals off-the-air by using an input selector switch and antenna, and, therefore, they have not yet taken steps to regain that capability if they so desire.

## PROCEDURAL MATTERS

158. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

**I. Need for and purpose of the rules.**

The Commission's must carry rules for cable television systems were ruled constitutionally invalid in *Quincy Cable TV, Inc. v. FCC.* After examination of the record, the Commission determined that the most appropriate course of action in this matter was to adopt a two-part regulatory program that will provide an orderly transition from the current situation where there is need for must carry regulation, to its long-term objective of developing a video marketplace in which consumers will be able effectively to choose between cable and broadcast television program services. The first part of this program required cable systems to offer their subscribers input selector switches that enable use of an antenna in conjunction with cable service and to implement a consumer education program to inform subscribers that it may be necessary to have off-the-air reception capability to receive all the available broadcast signals. This program is intended to eliminate, over time, the current perceived capability of cable systems to limit their subscribers' access to over-the-air broadcast stations. The second part of this program consists of interim must carry rules that will expire at the end of five years. These rules will provide for an orderly transition to a market environment where must carry rules are no longer necessary. During the transition period, the input selector switch offer and consumer education requirements will work gradually to supplant the need for must carry rules and to assure subscribers' access to local television broadcast stations.

We have modified the specific requirements of this program to reduce the burden it imposes on the regulated parties, particularly the cable industry. We have replaced the requirements for cable systems to provide switches to

their subscribers at no cost with a requirement merely to offer switches to subscribers. Cable systems thus will be free to set a price for purchase or lease of input selector switches, including associated hardware and installation. In addition, cable systems located in areas where there are no available off-the-air signals will not be subject to any portion of the new requirements.

**II. Summary of issues raised by petitioners in response to the final regulatory flexibility analysis, Commission assessment and changes made as a result.**

A. *Issues raised.* No petitioning or commenting parties raised issues specifically in response to the final regulatory flexibility analysis. However, many parties objected to the economic burden they claim would be imposed on the cable industry as a result of the new program, particularly the requirement to provide input selector switches to subscribers at no cost. The revised input selector switch requirements and the full exemption from the rules for cable systems located in areas where there are no available off-the-air signals will resolve these concerns. In addition, the modifications to the rules to specify the consumer education requirements as a series of general requirements rather than specific suggested language will provide cable systems with additional flexibility to provide their subscribers with information suited to their particular circumstances. Thus, the revised program will substantially reduce the economic burden on all cable systems. We also believe that our program as revised herein will continue to provide for the needs of the commercial and noncommercial television industries as discussed in the final regulatory flexibility analysis.

B. *Assessment.* The revised input selector switch, consumer education and interim must carry requirements will be significantly less burdensome than those adopted in the *Report and Order.* While these revised rules will impose some burdens on cable operators, they are necessary to the achievement of our federal objectives.

C. *Changes made as a result of petitions and comments.* While no parties filed petitions or comments concerning the final regulatory flexibility analysis, many parties suggested alternative regulatory policies. Our revisions to our two-part program reflect our consideration of these suggestions and the effect of our policies on small business entities in both the broadcast and cable industries.

**III. Significant alternatives considered and rejected.**

We have considered all the arguments and alternatives presented in the petitions and comments responding to the *Report and Order.* After full consideration of all the issues raised therein, we have revised the rules in a manner that is most appropriate in light of the facts and issues presented.

159. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements on the public. Implementation of these new/modified requirements and burdens will be subject to approval by the Office of Management and Budget by that Act.

160. The Secretary shall cause a copy of this *Memorandum Opinion and Order,* including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§601 *et seq.* (1981)).

161. Accordingly, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act and Section 1.106 of the Commission's rules, IT IS ORDERED THAT the petitions for reconsideration of the *Report and Order* filed by parties named herein ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects. In addition, IT IS ORDERED THAT Part 76 of the Commission's rules IS AMENDED as set forth in Ap-

pendix B, effective June 10, 1987. IT IS FURTHER ORDERED THAT the "Motion to Vacate Report and Order and for Termination of Proceeding" filed by Century Communications Corp., *et al.* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Attachments: Appendices A and B

## APPENDIX A

### Petitioners

1. ABC Television Affiliates Association
2. Joint Petition by Adelphia Communications Corporation, Arizona Cable Television Association, Bachow and Elkin, Inc., Coaxial Communications, The Essex Companies, Falcon Cable TV, Hauser Communications, Inc., Hearst Cablevision of California, Inc., The Helicon Group ltd., Insight Communications Company, L.P., McCaw Communications Companies, Inc., Nashoba Communications Limited Partnership, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Warner Cable Communications, Inc., and Whitcom Investment Company (Adelphia).
3. American Christian Television Services, Inc.
4. Association of Independent Television Stations, Inc.
5. California Cable Television Association
6. Joint Petition by Century Communication Corp., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., North Carolina CATV Association, OCB Cablevision, Inc., Ocean Associates, Perry Cable TV Corp., Riverview Cablevision Associates, St. Charles CATV, Inc., United Artists Cablesystems Corp., and United Cable Television Corp. (Century)
7. Continental Cablevision, Inc.
8. Corporation for Public Broadcasting, National Association of Public Television Stations, and The Public Broadcasting Service (CPB) Educational Broadcasting Corporation

10. Gill Industries, Inc.

11. Haley, Bader and Potts on behalf of Joint Broadcast Television Petitioners (Joint Broadcast Petitioners)

12. Lincoln Broadcasting Company

13. Joint Petition by the National Cable Television Association, Inc., the Community Antenna Television Association, and the National Association (Joint Industry Petition)

14. Supplemental Petition by the National Cable Television Association, Inc., and the Community Antenna Television Association (NCTA and CATA)

15. The National Association of Broadcasters

16. Range Television Cable Co., Inc.

17. Richard S. Leghorn

18. Spanish International Communications Corporation and Spanish International Network, Inc. (SICC)

19. Taft Broadcasting Company

20. Television Operators Caucus, Inc.

21. Joint Petition by Texas Cable TV Association; Virginia Cable Television Association; Georgia Cable Television Association; Multi-Channel TV Cable Co., and Buford Television, Inc. (Texas Cable)

22. Turner Broadcasting System, Inc.

23. WLIG-TV, Inc.

24. Office of Communication of the United Church of Christ, Henry Geller and Donna Lampert

25. The National Independent Television Committee

26. Midwest Television, Inc.

27. Tele-Communications, Inc., TKR Cable Company, and TCI-Taft Cablevision Associates (TCI)

28. Meredith Corporation
29. Hubbard Broadcasting, Inc.
30. Television Communications, Inc.

**Opposing/Responding Parties**

1. Association of Independent Television Stations, Inc.
2. The Corporation for Public Broadcasting (CPB), the National Association of Public Television Stations (NAPTS), and the Public Broadcasting Service (PBS) [CPB].
3. Richard S. Leghorn
4. Association of National Advertisers, Inc.
5. Pico Macom, Inc.
6. Marantha Broadcasting Company, Inc.
7. Tele-Communications, Inc.
8. National Association of Broadcasters

**Replies To Responses**

1. Joint Reply by Century Communications Corp., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., North Carolina CATV Associations, OCB Cablevision, Inc., Ocean Associates, Perry Cable TV Corp., Riverview Cablevision Associates, St. Charles CATV, Inc., United Artists Cablesystems Corp., and United Cable Television Corp. (Century)
2. Turner Broadcasting System, Inc.
3. National Cable Television Association, Inc.

4. Joint Reply by Adelphia Communications corporation, Arizona Cable Television Association, Bachow and Elkin, Inc., Coaxial Communications, The Essex Companies, Falcon Cable TV, Hauser Communications, Inc., Hearst Cablevision of California, Inc., The Helicon Group Ltd., Insight Communications Company, L.P., McCaw Communications Companies, Inc., Nashoba Communications Limited Partnership, Pennsylvania Cable Television Association, Sunbelt Cable, Ltd., Tele-Media Corporation, Tidel Communications, Inc., Vision Cable Communications, Inc., Warner Cable Communications, Inc., and Whitcom Investment Company (Adelphia).
5. Gill Industries, Inc.
6. Lincoln Broadcasting Company
7. Richard s. Leghorn
8. Association of Independent Television Stations, Inc.
9. The National Independent Television Committee

## Appendix B

I. Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, and 521.

2. Section 76.5 is amended by reviewing paragraphs (d)(1), (d)(1)(ii), and (d)(2) and by adding a new paragraph (d)(3) to read as follows:

§76.5 Definitions.

* * * * *

(d) *Qualified station.* (1) Any television broadcast station, as defined in §76.5(b), except where such station would result in payment by the cable system of distant signal copyright fees, that with respect to a particular cable system:

(i) * * *

(ii) If a commercial station, receives an average share of total viewing hours of at least two percent and a net weekly circulation of at least five percent, as defined in §76.5(k), in noncable households in the county served by the cable system or has been operational less than one full year. For purposes of this section, a station is considered operational as of the date it initially commences operation under program test authority. Changes in station operations, for example, upgrade of facilities, transfer or assignment of license, or recommencement after operations have ceased, are not considered initial commencement of operations under this paragraph. The viewing standards of this paragraph shall not apply for one full year from June 10, 1987, to otherwise qualified stations that commenced operation after July 19, 1985, but before June 10, 1987 (the effective date of these rules). Once a commercial station has demonstrated that, on the basis of a full one-

year survey season, it meets the viewing standard, it will be considered to have satisfied this standard for the remainder of the period until June 10, 1992; Provided, however, that at any time after one year from one date a commercial station demonstrates that it meets the viewing standard, a cable system may nullify the station's mandatory signal carriage eligibility if it demonstrates, using the methodology specified in Section 76.55 of this Part, that the station no longer meets the viewing standard.

(2) Any noncommercial educational television station's translator with 5 watts or higher power serving the cable community.

(3) A full service station or translator qualifies as a noncommercial educational station for purposes of these rules if it is licensed to a channel reserved for noncommercial educational use pursuant to §73.606 of this chapter. The Commission also will consider whether stations operating on nonreserved channels qualify as noncommercial educational stations on a case-by-case.

3. Section 76.55 is amending by revising the introductory paragraph to read as follows:

§76.55 Qualified television station; method to be followed for showings.

A commercial television station shall demonstrate that, for the previous survey season, it meets the viewing standard specified in §76.5()(1)(ii) on the basis of an independent professional survey of noncable homes conducted according to the following provisions:

* * * * *

4. Section 76.56 is amended by removing paragraph (c)(2), redesignating paragraph (c)(3) as (c)(2) and retaining the NOTE following redesignated (c)(2), adding new paragraph (c)(3), an by revising paragraph (d) to read as follows:

§76.56 Mandatory carriage of television stations.

* * * * *

(c) * * *

(3) Is duplicated by another station that is carried; including where both a commercial parent station and its satellite station(s) qualify, and, in the case of noncommercial stations, where a parent station and its satellite and/or translator stations) qualify.

(d) A cable system shall not accept direct (monetary) payment or other indirect (nonmonetary) consideration in exchange for carriage of the signal of any qualified television station carried in fulfillment of mandatory signal carriage obligations, *except that* any such station may bear any costs associated with delivering a good quality signal, as defined in paragraph (c)(2) of this section, to the cable system.

* * * * *

5. Section 76.60 is amended by revising paragraph 9a) to read as follows:

§76.60 Carriage of other television signals.

(a) In addition to the qualified television station(s) carried pursuant to §76.56, a cable system may carry the signals of any other television stations, and also may carry low power television stations, television translator stations, foreign television stations, satellite distributed program services, direct broadcast satellite stations and programming from any other sources.

* * * * *

6. Section 76.62 is amended by revising paragraph 9a)(2), redesignating paragraph (b) as paragraph (d) and adding new paragraphs (b) and (c) to read as follows:

§76.62 Manner of carriage.

(a) * * *

* * * * *

(2) the signal shall be carried without material degradation.

(b) Where a broadcast television station carried in fulfillment of the mandatory signal carriage obligations is carried on a tier of service, all signals carried in fulfillment of those obligations must be carried on that tier; Provided, however, that a signal carried in fulfillment of mandatory signal carriage obligations may be placed on a tier of service, reception of which requires separate terminal device, if such devices are provided free of charge to all subscribers.

(c) All broadcast television stations carried in fullfillment of mandatory carriage obligations must be included on the lowest-priced tier of service separately available to each cable subscriber. The tier of service on which such stations are carried also must be accessible on additional receiver connections which the subscriber. The tier of Service on which such stations are carried also must be accessible on additional receiver connections which the subscriber may purchase.

* * * * *

7. Section 76.66 is revised in its entirety to read as follows:

§76.66 Input selector switches and consumer education.

(a) A cable system operator shall offer to supply to each new subscriber and each existing subscriber an input selector switch for each separate television receiver for which cable service is provided by the cable operator. The operator shall comply with the following in offering the switch and installing cable service:

(1) Offer to supply and install a switch for all new and existing subscribers within six months of June 10, 1987, and thereafter on an annual basis until June 10, 1992,

unless the subscriber already has an input selector switching device or his/her television receiver has such a device built-in;

(2) A cable operator may charge for the purchase or lease of switches and associated hardware and may separately charge for installation of switches for existing subscribers. However, a cable operator may not charge new subscribers a separate fee for switch installation.

(3) A cable system operator is not required to provide a switch to any subscriber who declines the required offer, but is not thereby relieved from making the offer to any such subscriber thereafter on an annual basis;

(4) The switch offer shall be made using text chosen by the cable operator that includes the following points:

(i) An offer to supply an input selector switch for each separate television receiver to which cable service is provided;

(ii) The switch connects both to the cable service and an antenna, and enables selection between cable service and off-the-air broadcast television signals;

(iii) If the subscriber already has switching capability, either in a separate device or as a built-in feature of his/her television receiver, an additional switch may not be needed;

(iv) If the subscriber desires switching capability, he/she may have the cable system install a switch or may obtain a switch from it with written self-installation instructions;

(v) Switching capability may be obtained from other from other suppliers; and,

(vi) For the subscriber's convenience, attach an offer response form to be returned to the cable system's business office.

(5) Comply with the following requirements with respect to antennas:

(i) If an antenna is present, the operator shall not recommend that the antenna be removed;

(ii) If an antenna is not present, the operator shall inform the subscriber that the switch will be operational only if it is connected to an antenna;

(iii) Where the operator installs a switch and an antenna is present, it shall connect the switch to that existing antenna.

(b) Individual cable subscribers are not required to purchase or lease input selector switches from their cable system. Subscribers may obtain such switches from suppliers other than their cable systems. Although cable subscribers are encouraged to establish and maintain independent access to off-the-air broadcast signals, they are not required to do so.

(c) The cable system operator shall provide the following information to each subscriber at the time of installation of cable service and to existing subscribers, in writing, within six months after June 10, 1987, and annually thereafter to all subscribers, using whatever language the operator deems appropriate to convey the following:

(1) Until June 10, 1992, the cable system may not be required to carry all broadcast signals available off-the-air in the community, and that,

(2) After June 10, 1992, the cable system will no longer be required to carry any broadcast signals; and thus,

(3) It may be necessary to use an antenna, in conjunction with an input selector switch, to access broadcast signals available off-the-air and not carried by the cable system;

(4) A description of the function of an input selector switch and state that its purpose is to aid the viewer in preserving independent access to off-the-air television service;

(5) That input selector switches may be obtained from suppliers other than the cable system and that there may be a range of switch options available, such as simple manual cable/broadcast switches, multiple input sources switches, electronic switches, remote control switches, and receivers with built-in switches;

(6) Identify for their subscribers, by call sign and channel number, any full service broadcast signals not carried on the cable system whose predicted Grade B contour covers any portion of the cable community or that are "significantly viewed" in the cable community, as defined in §76.5(k) of the rules (the list of stations must be current to within one month of the distribution of the information required pursuant to this paragraph);

(7) Indicate that questions related to input selector switches should be directed to a specified individual at the cable system and provide a telephone number at which that person can be reached.

8. Section 76.67 is amended by revising paragraph (a) to read as follows:

§76.67 Sports broadcasts.

(a) No community unit located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast signal carried by the community unit meeting the criteria specified in §§76.5(ii)(1) - 76.5(ii)(3) of this part. For purpose of this section, if there is no television station licensed to the community in which the sports event is taking place, the applicable specified zone shall be that of the television station licensed to the community with which the sports event or local team is identified, or, if the event or local team is not identified with

any particular community, the nearest community to which a television station is licensed.

* * * * *

9. New Section 76.70 is added to read as follows:

§76.70 Exemption from input selector switch and mandatory signal carriage rules.

(a) Cable systems serving communities where no portion of the community is covered by the predicted Grade B contour of at least one full service broadcast television station or noncommercial educational television translator station operating with 5 or more watts output power and where the signals of no such broadcast stations are "significantly viewed" in the county where the cable community is located shall be exempt from the provisions of §76.66 of this chapter. Cable systems may be eligible for this exemption where they demonstrate with engineering studies prepared in accordance with §73.686 of this chapter and other showings that broadcast signals meeting the above criteria are not actually viewable within the community.

(b) Where, prior to June 10, 1992, a new full service broadcast television station, or a new noncommercial educational television translator station with 5 or more watts, or an existing such station of either type with newly upgraded facilities provides predicted Grade B service to a community served by a cable system previously exempt under paragraph (a) of this section, or the signal of any such broadcast station is newly determined to be "significantly viewed" in the county where such a cable system is located, the cable system at that time is required to comply fully with the provisions of §76.66 of this chapter. Cable systems may retain their exemption under paragraph (a) of this section where they demonstrate with engineering studies prepared in accordance with §73.686 of this chapter and other showings that broadcast signals

meeting the above criteria are not actually viewable within the community.

(c) Where the changed circumstances described in paragraph (b) of this section occur after June 10, 1992, the cable system at that time will be required to comply only with the provisions of §76.66(d) remaining in effect.

10. Section 76.617 is amended by designating the present undesignated text as paragraph (a), and by adding new paragraph (b) to read as follows:

§76.617 Responsibility for interference.

(a) Interference generated by a radio or television receiver shall be the responsibility of the receiver operator in accordance with the provisions of Part 15, Subpart A of this chapter: Provided, however, That the operator of a cable television system to which the receiver is connected shall be responsible for the suppression of receiver-generated interference that is distributed by the system when the interfering signals are introduced into the system at the receiver.

(b) Interference resulting from the use of an input selector switch shall be the responsibility of the switch operator in accordance with the transfer switch provisions of Part 15 of this chapter: Provided, however, That the operator of a cable television system to which the switch is connected shall be responsible for suppression of emissions of RF energy resulting from use of input selector switches that are in excess of the Signal leakage and radiation limits of part 76 of this chapter.

## SEPARATE STATEMENT
## OF
## COMMISSIONER JAMES H. QUELLO
## CONCURRING-IN-PART AND DISSENTING-IN-PART

Re: Amendment of Part 76 of the Commission's Rules concerning Carriage of Television Broadcast Signals by Cable Television Systems.

My separate statement to the *Report and Order* stated that the must-carry rules adopted in this proceeding are the very minimum I can support. The petitions for reconsideration and responsive pleadings strengthen my belief that the only reasonable solution to the problems confronting the Commission is a permanent must-carry rule. Thus, while I support the must-carry rules adopted by the Commission in its *Memorandum Opinion and Order*, the legal justifications employed, as well as the sunset provision, constrain me from endorsing wholeheartedly the decision in its entirety.

At the outset, no evidence has been presented causing me to revise my previous observations regarding the geographic monopoly bottleneck of cable systems.[1] Once in-

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[1] Congress recognized the ability of cable to behave as a bottleneck when adopting the Cable Communications Policy Act. While discussing the constitutionality of the Act's access provisions, the House Report said:

> If these [cross ownership rules] are permissible, then surely a less restrictive regulation that does not absolutely ban speech through the cable medium, but requires only some *limited sharing of bottleneck facilities* on a content neutral basis, is also valid. (emphasis supplied)

H.R. Rep. No. 98-934, 98th Congress., 2nd Session, August 1, 1984 at 33. Moreover, the courts have found that cable may be considered a natural monopoly, thereby allowing a city to "offer a de facto exclusive franchise in order to create competition for its cable television market. *See e.g., Central Telecommunications Inc. v. TCI*, 610 F.Supp. 891 (D.C. Mo. 1985). *aff'd* 800 F.2d 711 (8th Cir. 1986), *cert. denied* __U.S. __ (1987)

stalled, cable becomes the gatekeeper for the distribution of video product into the home. Unlike broadcasting, cable has little or no programming accountability to any government authority. I still believe the Commission made a tragic mistake by not appealing the *Quincy* decision.[2] I also believe it was error to stay implementation of the must-carry rules while the reconsideration was pending.[3]

My overall views are set forth in my separate statement accompanying the Commission's *Report and Order*.[4] Because the rules—in particular the input selector switch rules—adopted on reconsideration are different from the rules adopted in August, I believe further explanation of my position is warranted.

I would have preferred the Commission to place greater emphasis on the statutory obligations imposed by Section 307(b) of the Act. Localism is one of the cornerstones of communication policy and should have served as the primary legal basis for the must-carry rules and consumer education requirements. It is obvious the Supreme Court recognizes localism as a substantial government interest,[5]

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[2] *Quincy Cable TV, Inc. v. FCC* 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502).

[3] *See Order*, FCC 86-575 (released December 24, 1986).

[4] *Report and Order* in MM Docket No. 85-349, 1 FCC Rcd. 864, 912 (1986) (Quello, concurring).

[5] The Supreme Court has stated:

> There can be little doubt that the comprehensive regulations developed over the past twenty years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest. In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of view-

a fact recognized by the *Quincy* court.[6] The point of departure in *Quincy* was that the Commission did not, at that time, demonstrate that our 307(b) policies would be at risk absent must-carry rules.[7]

The record in this proceeding demonstrates that must-carry obligations are necessary to maintain the integrity of our allocation scheme and to promote service to the local community.[8] Evidence to support this proposition is

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ers. *See e.g., Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d, at 744-746. To accomplish this regulatory goal, the Commission has deemed it necessary to assert exclusive jurisdiction over signal carriage by cable systems.

*Capital Cities Cable Inc. v. Crisp*, 104 S.Ct. 2694, 2708 (1984). *See also National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

[6] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1454 n. 43.

[7] Writing for the court Judge J. Skelly Wright stated:

> We reiterate that this case has not required us to decide whether, as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest. We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. *Should the Commission move beyond its "more or less intuitive model," as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment.* As long as it continues to rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done. (emphasis supplied)

*Id.* at 1459.

[8] *See* Comments of the Association of Independent Television Stations Inc.; Television Operators Caucus, Inc.; National Association of Broadcasters; and Letter from Senator John C. Danforth, Chairman, Com-

clear and convincing. Since the *Quincy* decision, more than 180 public television stations have been dropped from carriage.[9] The record also demonstrates that numerous commercial stations have been dropped? refused initial carriage or charged exorbitant fees to either secure carriage or maintain the same channel position on cable that they were assigned by the FCC.[10]

The damage to our local allocations scheme is exacerbated when we realize two facts. First, the cable industry has taken extraordinary steps to ensure cable systems do not drop signals or refuse carriage while this proceeding is pending.[11] Second, there are strong competitive incentives for local cable systems to drop or refuse carriage to broadcast stations. The cable industry is aggressively selling commercial time in local markets in competition with local broadcasters. Our decision last August expressly recognizes this fact.[12] I believe the evidence contained in the record reflects merely the tip of the iceberg With regard to the danger to our allocations scheme. Given the competitive incentives To drop local signals—which the *Report and Order* expressly recognizes—I believe we have moved

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mittee on Commerce, Science and Transportation to Honorable Mark Fowler, dated July 22, 1986, at 4.

[9] *See* Opposition of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service to Petitions for Reconsideration at 11 n. 12, *citing* letter of the National Association of Public Television Stations, Peter M. Fannon, President, January 30, 1987.

[10] *See* Consolidated Opposition of the National Association of Broadcasters to Petitions for Reconsideration Appendix B; Comment Association of Independent Television Stations Inc.

[11] *See* Comments of the Independent Television Association of Independent Television Stations, Inc. at 6, *citing* Address of Edward Allen, Chairman, National Cable Television Association, to the Washington Metropolitan Cable Club, September 18, 1985.

[12] *Report and Order* in MM Docket No. 85-349, 1 FCC Rcd. 2314, 2331 (1986).

far beyond the "more or less intuitive model' criticized by the *Quincy* court.

It is significant that both the *Report and Order* and the *Memorandum Opinion and Order* state expressly that the decision "contributes to 307(b)" objectives by fostering independent access to local off-the-air television.[13] If our policies result in the effective use of A/B (input selector) switch technology, then the decision comports with our 307(b) objectives. However, as I have stated on previous occasions, the efficacy of the A/B (input selector) switch option is doubtful. Furthermore, while I generally agreed with lessening the burden of a mandatory switch requirement, the optional approach adopted by the Commission makes the effectiveness of the A/B (input selector) switch even more questionable. In fact, it is difficult to distinguish the obligations imposed by the new input selector switch rules from the status quo. Subscribers have always had the option to purchase an A/B switch. The only real difference between this decision and the current state of affairs is the consumer education program. Whether the "new awareness" of the need for an A/B switch and outdoor antenna will achieve its intended purpose—independent access of off-air signals—remains questionable.

While I disagree with the majority's conclusions that tend to minimize the magnitude of the threat to our 307(b) policies, the decision today does not abandon this statutory obligation. The decision, in my mind, does not serve as precedent for the proposition that the Commission is no longer concerned with the economic effects of the cable industry on local over-the-air television.[14] Indeed, the con-

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[13] *Memorandum Opinion and Order* at para. 49.

[14] The unbalanced market relationship between cable and broadcasting was a factor in the Commission's decision to propose new syndicated exclusivity rules. *Notice of Inquiry* in General Docket No. 87-24, FCC 87-65, ___FCC Rcd. ___(released April 23, 1987). We observed there that "repeal of the syndicated exclusivity rules may have unduly shifted

sumer education program and the interim rules are designed to facilitate access to *local* broadcast signals. Therefore, the decision in this docket is cast in the context of a perceived lack of harm To our 307(b) policies. The result may be far different if evidence becomes available That cable systems are in fact preventing access to over the air broadcasting.

To the extent the *Memorandum Opinion and Order* can be construed as promoting 307(b) solely by maximizing "consumer choice," then I must disagree. First, absent an effective A/B switching arrangement, the cable, consumer does not have the choice of tuning in a local signal where the cable system has decided to delete the station. The channel simply will not be made available. Second, dropping signals may lead to existing stations going dark or, if payment is required for carriage, drain funds from program acquisition and production. Moreover, uncertainty over carriage hinders the financing of new stations in the market. Together, these factors serve to limit "consumer choices" not only for cable subscribers but also for non-subscribers.

While the ability to choose local broadcast programming is an important component of Section 307(b), the Commission's statutory requirements go beyond merely pro-

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the competitive balance in cable's favor and against other programming outlets." *Id.* at para. 7. Concerns over the market place imbalance between cable and broadcasting were also expressed in our recent decision to examine the compulsory copyright license. *Notice of Inquiry* in General Docket No. 87-25, FCC 87-66, __FCC Recd. __(released April 23, 1987). The Commission's concerns with the economic relationships between the two media and its desire to provide a "level playing field" in those proceedings are applicable to the instant docket. In terms of priority, the issue of signal carriage has greater economic significance to local broadcasting than either syndicated exclusivity or the compulsory license.

viding cable subscribers with the freedom to choose.[15] Because broadcasters are obligated by statute to serve their local communities, it is incumbent upon the Commission to ensure those signals are, in fact, accessible.[16] Thus, if the means selected by the Commission to ensure independent off-air access proves ultimately to be ineffective, then the Commission has an obligation to revisit the issue.

Finally, I must take exception to the statement that protecting broadcasting *per se* in furtherance of 307(b) would have the effect of limiting choices. This is simply not true. Such a possibility exists only where the channel capacity of cable systems are so limited as to force a choice between local signals and cable programming. While this may be the case with older small-capacity cable systems, those systems being constructed today are not presented with this dilemma.[17] In fact, there is excess capacity on

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[15] While the majority choose not to emphasize this point, the Commission's decision in Television Deregulation creates an obligation to provide issue responsive programming to its community of license. *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984) *recon. denied* 104 FCC 2d 357 *appeal pending sub nom. Action for Children's Television v. FCC* No. 86-1425 (D.C. Cir., filed July 23, 1986). This obligation stems not only from interpretation of the public interest standard, *See Office of Communications United Church of Christ v. FCC*, 707 F2d 1413, 1429 n. 46 (1983) but also from Section 307(b) of the Act. *Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 207 *cert. denied* 76 S.Ct. 650 (1956).

[16] It would appear our current regulations requiring a licensee to place a city grade signal over its community of license become somewhat superfluous if a significant percentage of the population subscribes to cable and is unable to receive the licensee's signal. *See* Section 47 C.F.R. Section 73.685(a).

[17] Approximately 88 percent of existing cable systems have channel capacity greater than 20 channels. Fifty-nine percent of existing cable systems have between 30-50 channels. Thirteen percent have a channel capacity above 54 channels *Television and Cable Fact Book: Cable and Services Volume*, No. 54 (1986 Ed.) at A-45.

many of these new cable systems. Problems presented by lack of channel capacity will diminish greatly in the future. As a result, the Commission can further its 307(b) policies without diminishing overall service to the public.[18]

I strongly disagree with the Commission's decision to sunset the must-carry rules. Sunsetting the rules without the benefit of experience with our interim rules and education program is—to put it kindly—premature. Our decision is particularly inappropriate in light of the optional switch rules adopted on reconsideration. While burdensome, the required A/B (input selector) Switch rule adopted last August at least ensured that the switches would be placed in the home. The optional switch rule offers no such assurance. Our new policy seems to argue for a more cautious approach regarding elimination of signal carriage rules.

I fully recognize the importance of balancing First Amendment rights of cable operators with the necessity of protecting our broadcast allocations scheme. When it reviewed our former must-carry rules, the *Quincy* court seized upon both the A/B switch, as a less restrictive alternative to signal carriage obligations, and our failure to determine whether the switch would in fact work.[19] Evi-

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[18] I believe that program choices from nonbroadcast sources, *e.g.*, cable satellite or nonlocal broadcast stations, should not be considered as enhancing our localism objectives. Section 307(b) is applicable only to radio and television broadcasting and does not necessarily apply to these alternate video sources. *See National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (distinguishing DBS service from local broadcasting). Furthermore, I doubt the Commission would want to subject satellite programming to the regulatory regime envisioned by Section 307(b).

[19] Concerning the Commission's assumptions of the efficacy of the A/B switch the *Quincy* Court stated:

> In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective

dence contained in the record demonstrates that while the technology may be sufficient, switches may not be utilized. Therefore, the A/B switch may not, as a practical matter, be a viable alternative. Under the *Quincy* Court's own analysis, signal carriage rules appear to be the most narrowly tailored means of ensuring access to local broadcast signals. Accordingly, I believe a must-carry rule would pass muster under the *O'Brien* standard as articulated by the *Quincy* Court even absent a sunset provision.

I regret that we have not adopted broader and permanent must-carry rules. Nevertheless, I believe the rules adopted today establish a minimum base line for protecting the Commission's localism concerns.[20] The consumer education program and the interim rules are sufficiently tailored to meet the *Quincy* court's requirements. While the principal rationale established by the majority is sufficient to support the interim rules, I believe that the need to promote localism—a goal which my colleagues state is facilitated by the decision—should have been the focal point of our analysis.

I look forward to our oversight of the consumer education program as well as receiving data on the efficacy of the A/B (input selector) switch. I have no doubt that, during the next five years, my colleagues and the Court will come to see the wisdom of a permanent signal carriage rule.

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regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device that would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the vitality of local broadcasting.

*Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1457.

[20] *Id.* at 1461.

**United States Court of Appeals**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 86-1683** **September Term, 1987**

CENTURY COMMUNICATIONS CORPORATION, et al.,
*Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
*Respondents*

INDEPENDENT TELEVISION STATIONS, INC., SPANISH INTERNATIONAL COMMUNICATIONS CORPS., UNIVISION, INC., THE NATIONAL ASSOCIATION OF BROADCASTERS, LINCOLN BROADCASTING CO., NATIONAL CABLE TELEVISION ASSOCIATION, et al., OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, CORPORATION FOR PUBLIC BROADCASTING, NATIONAL ASSOCIATION OF PUBLIC TELEVISION, PUBLIC BROADCASTING SERVICE, NATIONAL BROADCASTING CO., INC., SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
*Intervenors*

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FILED DEC 11 1987
GEORGE A. FISHER
Clerk

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**No. 87-1280**

RICHARD S. LEGHORN,
*Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
*Respondents*

**United States Court of Appeals**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 86-1683 et al.** **September Term, 1987**

**PAGE TWO**

**No. 87-1301**

HUBBARD BROADCASTING, INC.,
*Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
*Respondent*

CORPORATION FOR PUBLIC BROADCASTING, et al.,
*Intervenors*

**PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION**

Before: WALD, Chief Judge, MIKVA, Circuit Judge, and McGOWAN, Senior Circuit Judge.

**JUDGMENT**

These causes came on to be heard on the petitions for review of orders of the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Communications Commission under review herein are hereby vacated, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*
For The Court
/s/GEORGE A. FISHER
George A. Fisher
Clerk

Date: December 11, 1987
Opinion for the Court filed by Chief Judge Wald.

Supreme Court, U.S.
FILED
APR 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1487,87-1506,
87-1510 and 87-1551

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
*Respondents.*

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CORPORATION FOR PUBLIC BROADCASTING, *et al.*,
*Petitioners,*

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
*Respondents.*

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**Petitioner for Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit**

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## CONSOLIDATED BRIEF OF RESPONDENTS CENTURY COMMUNICATION CORP., *ET AL.* IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Those Questions suggested by Petitioners are argumentative and evasive. The Questions presented are:

1. Whether FCC regulations which classify speakers and, upon private-party demand, mandate distribution and exhibition-format of the broadcast programming and commercial advertising messages of select class members over respondents' closed-circuit cable television systems, a causal effect of which is displacement and exclusion of other "equally protected" speakers and communications, exceed the constraint imposed, or unlawfully abridge freedoms protected, under the Speech and Press Clause of the First Amendment to the U.S. Constitution.

2. Whether FCC regulations which compel that respondents' cable television systems, without compensation, dedicate a significant portion of their privately owned, finite transmission capacity and electronic distribution facilities to exhibition of the programming and commercial announcements of prescribed television broadcast stations, upon demand of the station licensees, constitute a taking of respondents' property in contravention of the Due Process and Just Compensation Clauses of the Fifth Amendment to the U.S. Constitution.

## LIST OF PARTIES

Joint respondents here, joint petitioners in the court below, each of which owns and operates cable television systems, are:

CENTURY COMMUNICATIONS CORP.
CHASCO CABLEVISION, LTD.
CLEARVIEW CABLEVISION ASSOCIATES II
COLUMBIA ASSOCIATES, L.P.
DANIELS & ASSOCIATES, INC.
LANDMARK CABLEVISION ASSOCIATES
MONMOUTH CABLEVISION ASSOCIATES
MASADA COMMUNICATIONS, INC.
NATIONAL CABLESYSTEMS, INC.
OCB CABLEVISION, INC.
OCEAN ASSOCIATES
RIVERVIEW CABLEVISION ASSOCIATES
ST. CHARLES CATV, INC.
UNITED CABLE TELEVISION CORP.

The stock of respondents Century Communications Corp. and United Cable Television Corp. are publicly traded. All other respondents are privately-held business entities. Collectively, these joint respondents operate more than 200 separate cable television systems throughout the United States serving in excess of 2.5 million subscribing homes.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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**Nos. 87-1487, 87-1506,
87-1510 and 87-1551**

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OFFICE OF COMMUNICATION OF THE
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CORPORATION FOR PUBLIC BROADCASTING, *et al.*,
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CENTURY COMMUNICATIONS CORP., *et al.*,
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---

**Petitions for Writ of Certiorari
to the United States Court of Appeals
For the District of Columbia Circuit**

---

## CONSOLIDATED BRIEF OF RESPONDENTS CENTURY COMMUNICATIONS CORP., *ET AL.* IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

Respondents Century Communications Corp., *et al.* (hereinafter "Century" or "respondents"), owners and

operators of cable television systems throughout the United States and the lead petitioners in the court below, oppose those separate petitions of (1) Office of Communication of the United Church of Christ, (2) Corporation for Public Broadcasting, *et al.*, (3) National Association of Broadcasters, and (4) Association of Independent Television Stations, Inc. (hereinafter jointly referred to as "petitioners").[1]

## OPINIONS BELOW

The opinion of the court of appeals, dated December 11, 1987, is reported at 835 F.2d 292 (D.C. Cir. 1987) and reprinted in the Petitioners' Appendix ("App.") at 1a-28a. On January 29, 1988, the same court issued a "clarifying" Order, which is reported at 837 F.2d 517 (D.C. Cir. 1988) and also reprinted in the Appendix at 29a-31a. The D.C. Circuit opinion reviewed the FCC's *Report and Order* of August 7, 1986 adopting must-carry rules, 1 F.C.C. Rcd. 864 (1986) ("*R&O*") reprinted in Petitioners' Appendix

[1] While three of the four petitioners designate Century, *et al.* as respondents, petitioner Office of Communication of The United Church of Christ (No. 87-1487) names here the Federal Communications Commission and the United States as "respondents". Yet United Church's primary contention was below and is here to support the underlying constitutionality of the rules at issue. Its only difference with the FCC is that such rules do not go far enough in detail to satisfy it and the fact that they were designated "interim" (*i.e.*, to expire five (5) years after adoption). The thrust of United Church's petition seems to be that the underlying concept of the must-carry regulations is constitutionally sound and should have been sustained below, at least conceptually, on *statutory* grounds. United Church, we reiterate, is a vigorous promoter of must-carry regulation and stands fundamentally on the side of the FCC in this case.

32a-204a, *reconsid. denied*, 2 F.C.C. Rcd. 3593 (1987), Appendix 205a-330a.

## STATEMENT OF THE CASE

This case involves rulemaking by the Federal Communications Commission ("FCC") which produced a new set of content-based regulations referred to as "must-carry" rules.[2] Century Communications Corp., *et al.*, respondents here but petitioners below, jointly challenged the lawfulness of these rules on a variety of constitutional (First and Fifth Amendment) and statutory grounds, and the court of appeals, finding it necessary to decide only the First Amendment question, vacated the regulations as unconstitutional. The subject petitions followed.

The Court recently has had occasion to review cable television within the framework of franchising by local governmental authority, including market-entry factors, all within the context of First Amendment implications.[3] *Preferred* presented the question of the power of a municipality to require one to obtain a municipal "franchise" permitting installation of a permanent cable television distribution system within the community. More particularly, *Preferred* raised issues relating to the nature of such "franchising" authority and the extent to which cities might go in condition-

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[2] The first set of must-carry rules, which had been effective over two decades, was declared unconstitutional as incompatible with the First Amendment in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986).

[3] *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, (1986).

ing entry and use of public rights-of-way by a cable operator. Finding there that the activities of cable systems "plainly implicate First Amendment interests", 476 U.S. at 494, the Court, citing *United States v. O'Brien*, 391 U.S. 367 (1968), further noted that "where speech, and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests", 476 U.S. at 495. The Court concluded that those particular issues before it in *Preferred* involved considerably more than just communicative activity in that they also encompassed physical establishment and maintenance of a complex of cable-lines and other facilities over and under public streets and rights-of-way. Remanding that case for a fully developed record, the Court stated:

> We think that we may know more than we know now about . . . the present uses of the public utility poles and rights-of-way and how [the cable operator] proposes to install and maintain its facilities on them.

*Preferred*, 476 U.S. at 495.[4]

*Preferred*, therefore, combined that "element of conduct" (*e.g.*, permanent installation of cable plant within city streets) with "some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers" (476 U.S. at 494), thereby joining "in a single course of action" "communicative activity" and "conduct". As such, the

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[4] *See also id.* at 496 (Blackmun, J. concurring) (The Court's opinion in *Preferred* "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities").

*O'Brien* standard of review plays there a pivotal role in fashioning the parameters of permissible regulation even though the exercise of speech freedom may thereby be *incidentally* restricted. The *Preferred*-type issue is yet to be resolved in any definitive sense by the Court and is one undoubtedly to be revisited.

The instant case, however, raises First Amendment questions quite different and apart from those confronting the Court in *Preferred*. This case involves *only* federal regulation of *communicative* activity via the medium of *established* cable television lines. It is facial content-regulation by Government that is here at issue. That element of relevant "conduct", essential to an *O'Brien* analysis, is nowhere present. Following *Quincy*, the FCC promulgated a new set of "must carry" rules, the purpose and function of which, once again, was directly to control the content and distribution-format of those communications transmitted over cable lines. The rules in question are relatively simple and are codified at 47 C.F.R. §§ 76.5, 76.55, 76.56, 76.58, 76.60, 76.62, 76.64 and 76.66 (1987). They also are reprinted in the Petitioners' Appendix at 177a-187a.

By this current version of must-carry regulation, the FCC again frontally supervises "content" through classifying various speakers and then designating certain speech sources which *must* be distributed and exhibited on a highly favored basis over cable-television media.[5] Specifically, these FCC rules favor:

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[5] *See, e.g.*, Rule §76.62, App. 184a. It is noted that all parties below concurred in the proposition that *all* of the "speech" and *all* of those "speakers" presently or potentially affected by the must-carry rules at issue are *fully* and *equally protected* under the First Amendment.

- The speech of certain "qualified" "local" broadcast licensees over that of "distant" television stations (Rule §§76.5(d) and 76.56).
- The speech of the more popular, financially secure "local" broadcast licensees over that of other smaller, less popular and less affluent "local" licensees (Rule §76.5(d)).[6]
- The speech of "public" (non-commercial) "local" broadcast licensees over that of other local stations, and indeed over all speakers (Rule §76.56(a)(1)).
- The speech of "local" broadcast licensees, provided they satisfy the established "popularity" standard, over that of all non-broadcast speakers regardless of location or popular appeal (Rule §§76.5(d) and 76.56).
- The speech of newly operational "local" broadcast licensees, at least for one year, over the speech of new cable programmers (and indeed over *everyone* except a non-commercial station) (Rule §76.5(d)(ii)).
- The speech of a prescribed quota of local "qualified" television licensees over the discretion of cable operators in their capacity as speaker, editor, arranger and distributor (Rule §76.56(a)(2)).

*See also* Rule §76.58 (App. 182a-83a) whereby the FCC confers itself with the power to resolve all dis-

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[6] *See also Report and Order*, ¶¶144-146, App. 115a-117a.

putes regarding speech distribution and to impose monetary forfeitures upon those who fail to comply with its directives.[7]

The FCC candidly acknowledged that these new regulations constitute a comprehensive supervision of speech activity and that their primary function is directly to intrude upon and compromise editorial discretion.[8] As represented by the *Report and Order* giving birth to these rules:

- "This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media." (*R&O*, ¶120, App. 97a).

- "[W]e recognize must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights" (*R&O*, ¶138, App. 110a-111a).

- "We note that the interim rules are less intrusive on cable operators' editorial discretion than the former rules . . ." (*R&O*, ¶138, App. 111a).

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[7] The Court, we trust, will note the remarkable extent to which the subject petitions *avoid* all discussion of the workings of those rules which are the subject of this case. Their reason is obvious: The stated purpose and methodology of the regulations constitute a *per se* indictment of their lawfulness.

[8] Must-carry does *not*, as such, censor the content of any particular message but rather intrudes to classify speakers and to mandate and supervise the presentation of the speech of designated class-members over cable TV media.

- "[W]e find persuasive the more recent court analyses which conclude that cable's First Amendment rights are subject to a stringent review [as would apply in the case of a newspaper]" (*R&O*, ¶184, App. 141a).

- "Whereas [incidental burdens on speech] are assessed under the balancing standard enunciated in [*O'Brien*], content-based regulations are subject to a far more stringent standard" (*R&O*, ¶185, App. 142a-43a).

- "Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule" (*R&O*, ¶187 n. 150, App. 144a).

- "[The] must-carry rules are configured . . . so that the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary . . ." (*R&O*, ¶189, App. 146a).[9]

As was the case with the prior, unconstitutional rules, certain favored licensees of television stations are once more "guaranteed the right to convey their messages over the cable system while [non-broadcast] cable programmers [and *now* "unqualified" local stations] must

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[9] The FCC did *not* further elaborate upon the source of its authority to judge the permissible "severity" of a restraint placed by it on the "cable operators' editorial discretion".

vie for a proportionately diminished number of channels".[10]

The FCC and the court below, reaching dramatically different conclusions, relied upon this Court's *O'Brien* standard as the appropriate test in examining the constitutionality of these regulations.[11] The petitioners here, with the exception of the Office of Communication of the United Church of Christ, similarly assert that *O'Brien* is the appropriate standard of judicial review, but they further urge upon the Court that the D.C. Circuit erred in imposing "an unreasonably heavy evidentiary burden on the FCC to demonstrate" compliance with the *O'Brien* criteria.[12]

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[10] *Quincy Cable TV*, 768 F.2d at 1451. While respondents, each a cable-system operator, assert here an invasion of their editorial discretion, there is the separate constitutional perspective of the independent programmer (including the "unqualified" local station) seeking to distribute its message over the cable medium and who is directly frustrated by that governmental preference officially accorded the favored class of speakers. In both instances, exercise of a constitutionally protected activity is frontally and consciously restricted by a regulation designed to achieve just such end. The crucial question, equally applicable to the "rights" of cable operators and cable programmers alike, is whether the constraint and protections of the First Amendment foreclose such regulation.

[11] The court below took the position that it was "unnecessary" to "resolve [the] vexing question" of the appropriate standard of constitutional review since "the new, scaled-back edition [of must-carry rules] fails to satisfy even the less demanding first amendment test of *United States v. O'Brien* whose use here is advocated by the FCC". *Century*, App. 15a. Nonetheless the appeals court opinion does heavily lean toward *O'Brien* as the appropriate standard (*e.g.*, *Id.*, App. 17a-18a, *and see* App. 31a).

[12] Petition of Corporation for Public Broadcasting, p. i. *See*

Respondents urge, as they have from the outset, that *O'Brien* is inapposite to review of the regulations at bar. All parties appear to agree (or, at least, concede) that if *O'Brien* is perchance an improper standard by which to measure the constitutionality of the FCC's must-carry regulations, the rules must fall as incompatible with the First Amendment.

## REASONS FOR DENYING THE WRIT

### 1. *O'Brien*, On Its Face, Is Inapposite to Review of those FCC Regulations At Issue

That the activity of communication by cable television, in the context of a *Preferred* examination, calls for application of an *O'Brien* standard of review does not mean that such standard is universally to be the test in all matters involving cable and the First Amendment—especially where, as here, it is exclusively *content* regulation that is at issue. In *O'Brien*, the Court reiterated the principle "that a government regulation [of a nonspeech element of *conduct*] may be sufficiently justified [even where First Amendment freedoms are incidentally restricted] if":

(i) "it is within the constitutional power of the Government";

(ii) "it furthers an important or substantial governmental interest";

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*also* Petition of Association of Independent Television Stations, Inc., p. i. The position taken by petitioner United Church is that a mix of statutory obligations imposed on the FCC by Congress takes precedence over these constitutional concerns.

(iii) "the governmental interest is unrelated to the suppression of free expression; and"

(iv) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest".

*United States v. O'Brien*, 391 U.S. at 376-77. Application of an *O'Brien* evaluation requires that *each* of these four criteria be independently satisfied. *Id.* at 377. It is a threshold examination; and, as demonstrated *infra*, must-carry regulation fails at each juncture. Other than the asserted *O'Brien* rationale, neither the FCC nor petitioners suggests a basis upon which to justify direct, content-intrusive regulation of speech and media.

We examine, in order, each of those four (4) *O'Brien* qualifying criteria specifically in the context of the must-carry regulations under review.

A. ***The "Constitutional Power of the Government":*** The first, and most critical, hurdle to be crossed is a showing that the rules *on their face* are presumably constitutional in terms of consistency of purpose and means. This minimally comprehends some preliminary analysis of the regulatory scheme and its mechanics, and a reasoned judgment. Must-carry (*i.e.*, mandating content as well as a facial classification and prioritization of fully protected speech and speakers for distribution and publication over independently owned, fully protected communications media) is, in its most favorable light, presumptively *not* "within

the constitutional power of the Government".[13] The thesis, openly espoused by the FCC, is that Government, provided only that its objective is deemed "reasonable" or "necessary", may directly supervise content to substantively discriminate between equally protected speakers. Such regulation, we submit, is *per se* unconstitutional.[14] Must-carry unquestionably constitutes a form of "censorship".[15] Instead of preliminarily considering the underlying constitutionality

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[13] The avowed function of must-carry regulation, albeit under the cover of a public purpose, is to "restrict the speech of some elements of society in order to enhance" that of the favored licensee class, a concept universally condemned in principle by the Court as "wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 49-50 (1976). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 573 (1983).

[14] While a "compelling" State interest or the application of a relevant "categorization" doctrine *might possibly* serve to justify direct governmental control over the dissemination and reception of protected speech, no such claim has been asserted here by the FCC, the agency relying instead upon a subjective weighing of various "factors" to justify its acknowledged "intrusion" and "restrictions" on the exercise of protected freedoms. The theory, candidly advanced by the FCC, is that the "objective" of its policy sufficiently *outweighs*, and therefore "justifies", the restraint. According to the Commission, it is Government's *purpose* in directly supervising speech and favoring certain speakers that may adequately validate the chosen means—boot-strapping of the most primitive, objectionable variety.

[15] *E.g. Young v. American Mini Theatres*, 427 U.S. 50, 64 (1976) ("The essence of . . . forbidden censorship is content control"). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)(A law requiring publication "operates as a command in the same sense as a statute or regulation forbidding [distribution of] specified matter").

of must-carry, as *O'Brien* prescribes, the FCC, without examination or articulation, *assumes* the validity of its regulation. Thereby, that preemptive assessment, which must affirmatively and rationally be resolved if the "balancing" scales of *O'Brien* are to play any further role in the constitutional analysis, is quietly (*i.e.*, without mention) avoided. By so preordaining its judgment and thereby arbitrarily abbreviating the process, the FCC fatally discounts *ab initio* the First Amendment. That which follows only compounds the error.

B. ***The "Substantiality" of the "Governmental Interest":*** The stated "governmental interest" of must-carry is to protect and promote the speech of a select class of broadcast licensees *vis-a-vis* all other speakers. The means chosen to perfect such "interest" is establishment of "qualifying" criteria for entry into the favored class and the award to class members of special distribution rights for their speech. FCC Rule §76.5(d), App. 180a-182a. The court below, combing the agency record, found no requisite "substantiality" of governmental interest nor even a demonstrated "need" for the regulation. To the contrary, it did hold that the rules are "predicated not upon substantial evidence but rather upon several highly dubious assertions. . . ." *Century*, App. 18a. *See also id.* at 4a (finding "that the new must-carry rules are [un]necessary to advance any substantial governmental interest . . ."). Thus, must-carry, in isolation, flunks even this most lenient *segment* of constitutional examination.[16]

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[16] The "substantiality" of the government's "interest", we urge, is demonstrably not a relevant consideration where the

C. ***The Relationship of the "Governmental Interest" to Speech:*** The designated target of must-carry is not any "nonspeech element" of a cable operator's *conduct*, but is rather *speech* (*i.e.*, the operator's exercise of "editorial discretion" in the selection and distribution of protected communications). The FCC concedes that its "must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights" (*R&O*, ¶138, App. 111a), but, according to the agency, "the effects on cable operators' editorial discretion and cable programmers' access to the public are no more severe than necessary . . ." (*R&O*, ¶189, App. 146a).[17] Not only do such representations directly contradict substantial First Amendment values, they constitute here extraordinary admissions of constitutional infirmity.[18] "Con-

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regulation at issue squarely confronts the command of the First Amendment (as here, a direct, content-based intrusion on editorial discretion).

[17] Freely admitting that the rules directly intrude on "free speech rights" and "editorial discretion" thereby frontally restricting these protected freedoms, the FCC does not discuss its underlying authority to adopt such extraordinary regulations. *See, e.g.*, 47 U.S.C. §326—the anti-censorship provision of the Communications Act. The Constitution aside, the Act itself would seem organically to deny the administrative agency such awesome powers.

[18] *Miami Herald Publishing Co.*, 418 U.S. at 258 ("[W]hether fair or unfair [ ] . . . . [i]t has yet to be demonstrated how governmental regulation of [editorial discretion] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time"). The FCC strays so far afield as to represent: "Like the court in *Quincy*, we recognize that the same *O'Brien* test would apply to newspapers in assessing the constitutionality of a content-neutral rule" (*R&O*, ¶187 n. 150, App. 144a).

duct", in the *O'Brien* sense or context, is nowhere to be found in the must-carry scenario.[19] The focus of the FCC's "interest" is the *direct* supervision of speech distribution and, with even more particularity, the conscious advancement and protection of the speech of an already privileged class.[20] The essential theme of the rule is to favor the speech of a select few and, correspondingly, to suppress that of others. That the FCC may subjectively declare its regulatory goal "noble" or public-interest spirited, even if true, does nothing to cosmeticize or ameliorate the full implications of the First Amendment.[21] Neither may a laudatory purpose, however genuine, obviate here the mandate to track the prescription of *O'Brien*.[22] There

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[19] *See, e.g., Buckley v. Valeo*, 424 U.S. at 16-17 ("Some forms of communication . . . involve speech alone [and] some involve conduct primarily . . ." (*Id.* at 17). And it is only the latter that "reduce[s] the exacting scrutiny required by the First Amendment" (*Id.* at 16)). Must-carry unquestionably comprehends the regulation of "speech".

[20] *See, e.g., C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973). *See also Quincy Cable TV*, 768 F.2d at 1452-53 ("[M]ust-carry rules transfer control to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether"). "[A]dvantages [of a broadcast license] are the fruit of a preferred position conferred by the Government . . ." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 400 (1969).

[21] *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) (Decisionmakers "must not confuse what is 'good', 'desirable' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication").

[22] Even conceding there to be some measure of potential merit in the FCC's must-carry regime, such cannot serve to coalesce

is nothing "indirect", "neutral" or "noncommunicative" in the Government's "interest" or in the regulation's application to speech activity.[23] "Neutrality" can hardly be viable contention where the primary purpose of Government is officially to establish and promote, as between equally protected speakers, a preferred class of speaker.[24] This aspect of the rule, standing alone, would appear *per se* to breach as well that venerable principle of Equal Protection Under the Law. *Bolling v. Sharpe*, 347 U.S. 497 (1954). If one class of speaker is to be governmentally created and then favored over other speakers—the *raison d'etre* of must-carry—the scheme is by definition *directly related* "to the suppression of free expression", thus precluding use of an *O'Brien* evaluation.[25] Gov-

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the *O'Brien* standard of *constitutional* review into essentially a public-interest judgment where administrative expertise and agency discretion constitute the weight of authority.

[23] *Compare, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502 (1981) ("[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium . . ., but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects").

[24] The theory of the FCC is that by affirmatively compelling cable distribution of the message of the preferred "broadcast" speaker, unspecified First Amendment "values" will be achieved thereby off-setting the infringement. Such altogether ignores the bedrock principle that the role of the Speech and Press Clause is foremost to foreclose Government from such intrusive regulation, whatever the goal or rationale.

[25] *See, e.g., Consolidated Edison v. Public Service Commission of New York*, 447 U.S. 530, 533-536 (1980) (Even a restriction based on a "compelling state interest" must manifest an inherent "neutrality"). If the "concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is [indeed] wholly foreign to the First Amendment",

ernment, we submit, is *powerless* to favor by substantive regulation the message of one class of speaker over another where both possess equal entitlement to the protections of the First Amendment. The unique mechanics of must-carry—official establishment of a speaker-hierarchy and creation of systematic speech preferentials—would seem therefore to warrant something more than reliance upon *O'Brien*.

D. ***Must-Carry as an "Incidental Restriction on Alleged First Amendment Freedoms":*** There is nothing conceivably "incidental" about must-carry's intended application to and actual effect upon the freedom of speech and press.[26] The *modus operandi* of the rule is directly to govern the make-up and flow of communications over a concededly protected medium pursuant to FCC specifications.[27] The rule was promulgated with the specified purpose of promoting the speech of some and constricting the recognized speech freedoms of others. The Government's calculated objective is to mandate content through the acknowledged, extraordinary device of restricting the

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*Buckley v. Valeo*, 424 U.S. at 49-50, it would seem that this aspect of must-carry regulation would invite some discussion from proponents of the regime. No one (not even the court below) faces up to this glaring infirmity in the regulation.

[26] "Incidental" is defined as "subordinate, nonessential, or attendant in position or significance: occurring merely by chance or without intention or calculation . . .". Webster's *Third New International Dictionary, Unabridged* (1976). The court below, inexplicably, never does consider whether must-carry constitutes merely an "incidental infringement of speech". *See Century*, App. 4a.

[27] "Incidental" does not mean, as the beneficiaries of the rule imply, that the abridgment should, in degree, be subjectively "acceptable" and, therefore, judicially overlooked.

communicator's editorial discretion. Neither is there anything problematic or "alleged" regarding those guaranteed freedoms here at issue. It is indeed the FCC that accurately characterized the subject regulation as a "stringent . . . intru[sion] on cable operators' free speech rights" (*R&O*, ¶138, App. 111a).[28] Thus, there is nothing fortuitous or subliminal about those rights *intended* to be interdicted by must-carry. Government may not contextually contend that the intrusion "is no greater than is essential" without *first* logically finding that the speech restrictions worked by the rule fall only as an "incidental" effect of a legitimate, noncommunicative regulation. To do so is to invert the *O'Brien* process and thereby to immobilize the First Amendment.[29] That restriction placed by must-carry regulation on established First Amendment freedoms is, on its face, intentional, sub-

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[28] Imagine the virility that Mr. O'Brien's defense would have taken on had the Government there acknowledged that a primary (or even secondary) purpose of that law banning destruction of draft cards was to intrude upon and limit his speech freedoms. *Compare O'Brien*, 391 U.S. at 378-381.

[29] The FCC's concept of *O'Brien*, supported by petitioners, is universally to apply agency discretion to assess *all* restrictions on speech freedoms—whether incidental or direct. In such fashion, a law prohibiting intentional mutilation of a draft card is treated identically to a law directly supervising media content. According to this theory, it is only the magnitude of the restraint measured against the regulator's objective that is relevant to the constitutional examination. *Compare Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 297 (1961) (Even "sophisticated" regulation "cannot be employed in purpose or in effect to stifle, penalize or curb the exercise of First Amendment rights"). That blunt confrontation of must-carry with the command of the First Amendment is anything (or everything) but "sophisticated".

stantial, direct and communicative—any one of which forecloses, at the threshold, an *O'Brien* justification.[30] When the fact that the rule is facially speaker-partial is added to this calculus, any case the FCC may have had for First Amendment compatibility evaporates.

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It is only when each of the foregoing questions is affirmatively resolved that the decision-maker may properly invoke the scales of *O'Brien* to weigh the relative merits of the Government's "incidental restriction" on "alleged" speech freedoms *vis-a-vis* that "objective" to be achieved by the "presumably constitutional" regulation of "conduct". *O'Brien*, therefore, has nothing whatever to do with a regulation directly and purposefully restricting speech freedoms.[31]

In *O'Brien*, this Court, with exceptional precision, emphasized:

> [T]he Nation has a vital [, constitutionally legitimate] interest in having a system for

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[30] Were "must carry" to be applied conceptually to the print medium, there would be no question but that *O'Brien* is irrelevant. *Miami Herald, supra.* Yet, the FCC, dispelling all doubt as to its novel concept of the First Amendment, insists "that the same *O'Brien* test would apply [equally] to newspapers . . .". *R&O*, ¶187 n. 150, App. 144a.

[31] *See also Elrod v. Burns*, 427 U.S. 347, 362 (1976) (Under constitutional challenge, the burden rests affirmatively upon the government to justify any restraint). Twisting this established order, the FCC, as well as the beneficiaries of the regulation, blithely *assume* First Amendment compatibility thereby shifting *sub silentio* their obligations to those subjected to the abridgment.

> raising armies .... [T]he Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.
>
> [T]he continuing availability of issued Selective Service certificates [is reasonably assured by] a law which prohibits their willful mutilation or destruction. * * * * The [law] prohibits such conduct and does nothing more .... [B]oth the governmental interest and the operation of the [draft card law] are limited to the noncommunicative aspect of [Mr.] O'Brien's conduct.

*O'Brien*, 391 U.S. at 381-82 (citations omitted). The Court thus determined unconditionally, *and at the outset*, that the Selective Service law there under examination was *noncommunicative* in scope and that it furthered reasonably a *constitutionally legitimate* objective. Only after such finding is the door opened to that carefully guarded "balancing" evaluation.[32]

In stark contrast to that "draft card" law at bar in *O'Brien*, the FCC's must-carry regulation is aimed directly and only at *communicative* activity for the express purpose of partially controlling the exercise of *editorial discretion* and, thereby, *content* over a

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[32] The rationale of *O'Brien* is never to disarm the protections of the First Amendment but rather to extend them in context to also entail examination of certain forms of "conduct" where "speech" rights are "alleged" to be implicated (*e.g.*, a symbolic burning of one's draft card with the intention of conveying an anti-war statement). In the FCC's view, *O'Brien* provides a recipe for avoidance of the Amendment's constraint on Government as well as a means to penetrate *directly* those constitutional protections conferred thereunder.

fully protected medium of communication.[33] Must-carry has literally *nothing* to do with the "noncommunicative aspect" of a cable operator's "conduct" nor, for that matter, *anyone's* "conduct".[34] Supervision of content, including, *inter alia*, classification and protection of preferred speakers and explicit control over distribution format, is not rationally to be considered an "incidental" by-product or "accidental" side-effect of the FCC policy. It is the policy![35]

The command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press" is read by the FCC to imply the qualifier, "*except* where such abridgment may be related by Government to a public purpose".[36] Neither *O'Brien* nor any other precedent of the Court supports such inference.[37]

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[33] Only under the most forgiving of examinations could must-carry be considered anything less than *presumptively* unconstitutional.

[34] Neither the FCC nor petitioners ever identifies, or even alludes to, that relevant "conduct" to which the regulation is supposedly directed. Nor do they purport to consider whether the rule may be "communicative" in purpose or reach. Yet, all insist that *O'Brien* is the appropriate standard of review.

[35] Ignoring the essential thesis of *O'Brien*, the FCC relies on the case as substantive "authority" to assert direct regulatory control over purely "communicative" activity—a patent distortion of the Court's holding. Indeed, the general rule, with only rare exception, is that such subject matter is *foreclosed* to regulation. *See supra*, note 23.

[36] Discounting the freedoms of some so as to enhance those of a favored class—the slant which the FCC places upon this constitutional issue—is the very antithesis of First Amendment principle.

[37] Throughout its *Report and Order*, the FCC places great

The FCC construes *O'Brien* to confer upon it a broad, virtually unfettered discretion to assert jurisdiction over communicative functions and to apportion the values of the First Amendment, all bounded by little more than the agency's own prognostic powers and momentary perception of the public interest.[38] This, at best, is constitutional folly. Whatever *O'Brien* (or its progeny) may say or mean, it is not a ticket to undermining the potency of the First Amendment.

Therefore, *O'Brien* can play no role in the constitutional analysis of a restraint consciously placed on the exercise of fully protected speech freedoms under conditions where, as here, the restriction is *direct, substantial* and *communicative* in both application and effect. And without the asserted *O'Brien* rationale, the FCC rules at issue are bare of purported justification from any quarter. Thus, the abridgment of

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emphasis upon the fact that its must-carry program is "interim" since it currently specifies a sunset (*i.e.*, five years following adoption), and it urges that this limited life of the intrusion is constitutionally significant. *R&O*, ¶¶136-38 (App. 109a-111a), ¶188-89 (App. 145a-46a). Respondents know of no precedent or rationale suggesting that an abridgment of one month or five years is constitutionally more palatable than one of unspecified or open-ended duration. It is the *act* of abridgment that is the focal point of the constitutional examination. If Government has the authority to abridge First Amendment freedoms for five years, then it follows that such abridgment may be extended or renewed under the same authority. *See, e.g., Report and Order, Separate Statement of Commissioner James B. Quello*, App. 194a ("I want to make absolutely clear that I will use my best efforts to block any sunset of our must-carry rule . . .").

[38] Neither the FCC nor petitioners even consider that "constraint" squarely placed by the First Amendment upon the agency's jurisdiction. *Compare C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973).

must-carry is, on this record, unconstitutional *per se* as incompatible with the First Amendment.[39]

**2. The Court Below Reached the Correct Conclusion, and Indeed the Only One it Could, on the First Amendment Question**

The fundamental flaw underlying all of the subject petitions is that each assumes, without articulation, that licensees of television broadcast stations, as First Amendment speakers, are entitled to uniquely favorable treatment solely because of their status. That underlying assumption is wrong; and, indeed, it is the converse thesis which this Court has consistently applied. A broadcaster's privileged occupancy of the scarce, limited spectrum justifies and excuses a diminished First Amendment status, since "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 390 (1969).[40] *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943); *Columbia Broadcasting Sys-*

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[39] *See, e.g., S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

[40] This Court, albeit in a copyright context, has functionally equated cable television reception and distribution of broadcast signals to that of a television viewer. *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 400 (1968) ("The function of CATV systems has little in common with the function of broadcasters. . . . CATV systems receive programs and carry them by private channels to additional viewers" (footnotes omitted)). *See also, Teleprompter Corp. v. C.B.S.*, 415 U.S. 394, 408 (1974); *and see Lilly v. United States*, 238 F.2d 584, 587 (4th Cir. 1956), (Cable service is "a mere adjunct of the television receiving sets with which it was connected . . .").

*tem, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) ("Because the broadcast media utilize a valuable and limited public resource there is also present an unusual order of First Amendment values."). "[A]dvantages [of a broadcast license] are the fruit of a preferred position conferred by the Government", *Red Lion Broadcasting Co., supra*, 395 U.S. at 400, requiring a balancing of the licensee's rights as a "public trustee", *C.B.S., Inc.*, 412 U.S. at 118.

Petitioners contend, or at least imply, that by virtue of their special status as privileged broadcast licensees entitled to speak via the public's scarce airwaves, they thereby are further conferred with superior First Amendment rights *vis-a-vis* that of the viewer or "ordinary" citizen speaker, *viz.*, the right to demand that their speech be governmentally preferred over that of all other speakers. We are aware of no precedent of this Court condoning a systematic prioritizing by government of, or between, fully protected speech sources.[41] *Compare Buckley v. Valeo*, 424 U.S. 1, 49-50 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ").[42] *See*

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[41] The FCC's must-carry mentality—overt discrimination between speakers—is novel and without parallel to any other media application or context.

[42] *See also C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94, where the Court, at the instance of the broadcasting industry, established the principle of the licensee's "right to exercise editorial judgment" (412 U.S. at 111) and to accord or deny access to its communications facilities "based on its own journalistic judgment of priorities and newsworthiness" (412 U.S.

*also Minneapolis Star*, 460 U.S. at 592 ("no interest . . . can justify" governmental discrimination between media).

Regulation which, without subtlety, enables one entrepreneur, by simple demand and without charge, to commandeer the media facilities of another for purposes of distribution and publication of commercial speech would seemingly, if not manifestly, create presumptive problems under both the First and Fifth Amendments to the Constitution.[43] Petitioners bother not even to discuss these fundamental flaws inherent in the "must carry" scheme.

Licensees of broadcast television stations, like teachers, peace officers, sanitation workers, publishers and cable television operators (and sometimes even lawyers), unquestionably make a valuable contribution to the commonweal. But such licensees, however privileged or economically advantaged by their governmental grant, do not constitute a media elite elevated above the more pedestrian concerns of the First Amendment. The message of a broadcaster, commercial or otherwise and however entertaining, is constitutionally entitled to no more governmental protection than that accorded all speakers. The fundamental fallacy of the must-carry rule, like those

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at 118). Ironically, the broadcaster petitioners here would have the Court deny cable operators and programmers that same measure of editorial autonomy.

[43] *See, e.g., First English Lutheran Church v. Los Angeles County*, 107 S.Ct. 2378, 2389 (1987). *And see F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987) (Distinguishing, in a "takings" context, between regulations that "require" that access to private property be given to others and those which merely govern "economic relations" between consenting parties).

arguments of the petitioners, is the failure even to consider this bedrock principle of constitutional law.[44]

### 3. There Are No Conflicting Decisions Rendered By Other Federal Courts on the Same Question

Contrary to the assertions of petitioners, there is no conflict among the circuits nor is there any Supreme Court precedent in conflict with the *holding* of the opinion below. The Eighth Circuit's opinion in *Black Hills Video Corp. v. F.C.C.*, 399 F.2d 65 (8th Cir. 1968), petitioners' strongest case in support of their circuit-conflict argument, was repudiated by that same court ten years later. The Eighth Circuit had upheld the FCC's must-carry rules in *Black Hills* on the grounds that "[t]he Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." 399 F.2d at 69. However, in *Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd. on other grounds*, 440 U.S. 689 (1979), that same court stated:

> [W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.
>
> If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority, as above in-

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[44] Respondents do not recommend the opinion of the court below as representing a model of constitutional analysis or sound reasoning. We urge only that the ultimate result reached was "correct". *See S.E.C. v. Chenery Corp.*, 318 U.S. at 88.

> dicated, is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters.

In a footnote, the Eighth Circuit there limited *Black Hills* to its facts. 571 F.2d at 1054, n. 71.

Nor is there any precedent of this Court arguably upholding the constitutionality of the must-carry rules. Although the Court upheld the FCC's jurisdiction over cable television in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and its preemption of certain state regulation in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), it has never purported even to consider the constitutionality of the cable must-carry rules.[45] To the extent that a First Amendment challenge to cable regulations of a content-character has even been discussed by the Court, the issue was termed "not frivolous" in *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 709, n. 19 (1979).

There is no dispute here as to the FCC's jurisdiction over cable or its authority to preempt state regulation. The only decision made by the court below is that the current must-carry rules which are content-based are "incompatible with the first amendment". *Century*, App. 4a. There is no surviving judicial precedent in conflict with this holding.

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[45] In *Capital Cities*, the Court declined to consider the claim that the FCC's signal carriage rules violate the First Amendment rights of cable operators (467 U.S. at 700, n. 6). Similarly, the Court in *Southwestern* pointedly noted the absence of a constitutional claim in that case (392 U.S. at 181).

## CONCLUSION

The petitions should be denied.

Respectfully submitted,

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Nos. 87-1487, 87-1506, 87-1510 and 87-1551

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
*Petitioner,*
v.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
*Respondents.*

NATIONAL ASSOCIATION OF BROADCASTERS,
*Petitioner,*
v.
CENTURY COMMUNICATIONS CORP., *et al.*,
*Respondents.*

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
*Petitioner,*
v.
CENTURY COMMUNICATIONS CORP., *et al.*,
*Respondents.*

CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
AND PUBLIC BROADCASTING SERVICE,
*Petitioners,*
v.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
*Respondents.*

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## CONSOLIDATED OPPOSITION OF RESPONDENT RICHARD S. LEGHORN TO THE PETITIONS FOR A WRIT OF CERTIORARI

(Attorneys Listed on Inside Cover)

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May 9, 1988

## QUESTIONS PRESENTED

The Office of Communication of the United Church of Christ ("UCC"); the Corporation for Public Broadcasting, *et al.* ("CPB"); the National Association of Broadcasters ("NAB"); and the Association of Independent Television Stations, Inc. ("INTV") have each filed a petition for a writ of *certiorari*[1] seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Century Communications Corp., et al. v. Federal Communications Commission, et al.*, 835 F.2d 292 (D.C. Cir. 1987).[2] The questions raised by the petitioners may be distilled to the following:

> Whether the Court of Appeals properly applied the standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) in holding temporary must-carry rules to be unconstitutional restrictions on free speech, where the FCC was unable to "adduce either empirical support or at least sound reasoning on behalf of"[3] the rules.

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[1] This opposition is being filed as a consolidated opposition to the four petitions.

[2] The opinion below is reproduced in Petitioners' Appendix ("P.A.") at pp. 1a-28a.

[3] P.A. at 28a.

## PROCEDURAL STATEMENT

Richard S. Leghorn, formerly a cable operator and now an investor in cable enterprises, submitted comments to the FCC on the regulations at issue in these proceedings and was a petitioner in the consolidated proceedings before the Court of Appeals. Pursuant to Supreme Court Rule 34.2, Mr. Leghorn relies on the petitions of UCC, CPB, NAB and INTV for a list of the parties to the proceedings, the citations to the opinions and judgments delivered below, the jurisdictional statements, and the statement of statutory and constitutional provisions involved.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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Nos. 87-1487, 87-1506,
87-1510 and 87-1551

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OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
*Respondents.*

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NATIONAL ASSOCIATION OF BROADCASTERS,
*Petitioner,*

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
*Respondents.*

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ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
*Petitioner,*

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
*Respondents.*

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CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
AND PUBLIC BROADCASTING SERVICE,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## CONSOLIDATED OPPOSITION OF RESPONDENT RICHARD S. LEGHORN TO THE PETITIONS FOR A WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

**1. The FCC Regulations.**

In *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom., National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986), the Court of Appeals held that the First Amendment rendered "must-carry" rules promulgated by the Federal Communications Commission ("FCC" or the "Commission") unconstitutional. Those earlier rules required cable operators to carry the signals of all local broadcast stations. The rules were thought necessary by the FCC to "assure that the advent of cable technology not undermine the financial viability of free, community-oriented television." 768 F.2d at 1440.

In addressing the constitutional challenge to the rules, the *Quincy* court found it unnecessary to decide the precise level of First Amendment protection enjoyed by cable operators; rather, it found that two reasons rendered the must-carry rules invalid even under the lenient standard established by *United States v. O'Brien*, 391 U.S. 367 (1968). 768 F.2d at 1454. First, the court held that the FCC failed to substantiate a threat to free local broadcasting in the absence of the must-carry rules. 768 F.2d at 1459. Second, the court held that the rules were a fatally overbroad response to the problem posited by the FCC because they indiscriminately protected every local broadcaster regardless of the quality of local service available in a community, the number of local outlets

carried by a cable operator, or the degree to which a cable operator posed a threat to local broadcasting. 768 F.2d at 1460-63.

After *Quincy*, the FCC initiated a rule-making proceeding to consider new must-carry rules. In November, 1986, the FCC promulgated new, temporary rules.

The feature which most distinguishes the temporary rules from the permanent must-carry rules invalidated in *Quincy* is the justification offered for their promulgation. In crafting the temporary rules, the Commission did not attempt to garner evidence in support of the need to protect local broadcasting. Rather, after reviewing changes in the cable industry over the past two decades, the Commission concluded that "it is no longer appropriate or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television service from competition with cable service." P.A. at 97a.

The FCC did, however, perceive a temporary need to impose limited must-carry rules "to maximize the availability of program choices by competing providers both off-the-air and on cable." *Id.* After reviewing one study showing a decrease in the installation and use of antennas, P.A. at 100a, the Commission concluded that consumers incorrectly believed that "their only means of access to off-the-air signals is through their cable service." P.A. at 99a. The Commission argued that temporary measures were necessary to correct this "misperception" before "economic forces can be relied upon to achieve maximum diversity in program choices for the public." *Id.*

There were three main features of the regulations adopted by the FCC.[1] First, the regulations required

[1] The FCC regulations are reproduced in Petitioners' Appendix at 177a-88a and are codified at 47 C.F.R. §§ 76.5, 76.53, 76.55, 76.56, 76.58, 76.60, 76.62, 76.64 and 76.66.

cable operators to offer to install "input-selector devices" in consumers' television sets. P.A. at 185a-87a. *See also* P.A. at 112a-14a. These devices—costing as little as $7.50—permit viewers to readily switch from cable to broadcast programming, thus ensuring access to the greatest number of program choices. Second, the regulations required cable operators to educate the public about the availability of switches and their use to obtain broadcast signals not available over cable. *Id.* Finally, the regulations contained must-carry rules, effective for the five year period the Commission thought necessary for consumers to become accustomed to input-selector devices. P.A. at 180a-82a. *See also* P.A. at 114a-25a.

The temporary must-carry rules were more limited in scope than the permanent rules invalidated by *Quincy*. The temporary rules applied only to a portion of a cable operator's channel capacity and not at all to some cable operators. *See* P.A. at 180a-82a. *See also* P.A. at 119a-22a. Moreover, not all local broadcasters would be entitled to the benefit of the rules. P.A. at 177a-82a. *See also* P.A. at 114a-22a. To be entitled to carriage, a station must have a minimum audience or must otherwise fall into a class favored by the Commission as, for example, public broadcasting stations. *Id.*

**2. The Decision Below.**

In the Court of Appeals Mr. Leghorn argued that the new rules should be invalidated because they were not and could not be justified as a "precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980). Mr. Leghorn also argued that the temporary rules failed the First Amendment test established by *United States v. O'Brien, supra*. Because the FCC's input-selector switch and consumer information rules are fully adequate to ensure access to off-the-air signals and correct any consumer misperception, Mr. Leghorn contended there is no need to intrude on cable

operators' First Amendment rights by continuing must-carry rules. Certainly, no such need was demonstrated in the record before the FCC.[2]

A unanimous panel of the Court of Appeals did not find it necessary to address the broad constitutional arguments principally urged by the other petitioners below. P.A. at 14a-15a. Instead, the Court devoted its narrowly drawn decision to an examination of whether the FCC met its burden of establishing that the temporary must-carry rules met the *O'Brien* standard. P.A. at 15a-28a. The Court held that the agency had again failed to offer empirical evidence or sound reasoning showing a threat to a governmental interest sufficient to justify even an incidental restriction on speech. P.A. at 28a. The Court also found that the rules were overbroad because the FCC had supplied no evidence that five years of continued must-carry rules were necessary even if the existence of a valid governmental interest was presumed. P.A. at 26a-28a.

## REASONS FOR DENYING THE WRIT

### I. The Court of Appeals' Narrow Ruling Does Not Conflict With Other Court Decisions And Raises No Questions Warranting Review.

The petitioners misconstrue what the FCC and the Court of Appeals actually decided in an attempt to create

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[2] In his initial comments filed with the FCC, Mr. Leghorn advanced the concept of relying on input-selector switches rather than must-carry rules as a means to achieve the FCC's objectives without intruding upon constitutionally protected rights. In particular, he argued that the FCC should require manufacturers to design and sell television receivers with built-in switching capability so that cable subscribers could simply switch to off-air reception if their cable system did not carry the signal of a desired local television station. While the FCC did not adopt the built-in switch aspect of his proposal, Mr. Leghorn did not appeal the Commission's failure to do so because he believed the FCC's input-selector switch rules, as modified on reconsideration, accomplished most of what he sought to achieve, were not intrusive on First Amendment rights and obviated the need for temporary must-carry rules.

a conflict among the authorities or important issues warranting review. The FCC's and the court's reasoning and conclusions were, however, clear. The FCC enacted temporary must-carry rules to further a governmental interest in diverse programming which the FCC believed was temporarily threatened by an alleged "consumer misperception" that cable would always carry all broadcast signals. P.A. at 96a-100a. The Court of Appeals held that, because neither empirical evidence nor sound reasoning justified the need or effectiveness of these new must-carry rules, they could not pass constitutional muster even under the more lenient *O'Brien* standard. P.A. at 28a.

Nonetheless, the NAB's lead argument addresses the standard of First Amendment protection to which cable is entitled and takes as its starting point *Quincy's* discussion of that issue. NAB Pet. at 12-13. But neither *Quincy* nor the court below purported to decide the "vexing question" of what "level of First Amendment protection [is] due a cable television operator." *Century Communications*, P.A. at 14a-15a; *Quincy*, 768 F.2d at 1454. Rather, both decisions held that the must-carry rules presented for review were unconstitutional under the *O'Brien* standard—the standard the FCC argued should be applicable. *Century Communications*, P.A. at 28a; *Quincy*, 768 F.2d at 1463. An "either-broadcasting-or-print-model dichotomy"— which the NAB invites the Court to examine as "suspect"—was precisely the "flavorful" analogy which the Court of Appeals declined to utilize in analyzing the constitutional question presented to it.[3] *Century Communications*, P.A. at 13a-15a.

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[3] At one point in its petition, the NAB seems to suggest that the must-carry rules implicate no First Amendment concerns at all because cable systems can safely be treated, at least in part, as passive common carriers for the carriage of broadcast signals. NAB Pet. at 14-15. This theory was rejected by the FCC below and by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968), on which petitioners substantially rely. *See*

Similarly, the petitioners ignore the rationale advanced by the FCC in support of its regulations. The petitioners seek to reinstate must-carry rules by conjuring some threat to local broadcasting if an operator's decision to carry a broadcast signal is dictated by the market rather than the FCC. UCC Pet. at 11-17; CPB Pet. at 22-25; NAB Pet. at 26-27; INTV Pet. at 26-28. But this rationale was never offered by the FCC as a justification for its temporary must-carry rules, and accordingly was never reviewed by the court below. Indeed, while the permanent must-carry rules examined and rejected in *Quincy* were defended for their alleged protection of local broadcasting, in these proceedings the FCC expressly disavowed reliance on such a rationale to justify its temporary must-carry rules. P.A. at 96a-97a. *See also* P.A. at 9a.

The FCC's abandonment of an earlier justification presents no issue warranting review. It does not, as the petitioners suggest, create a conflict with this Court's opinion in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See* UCC Pet. at 11; CPB Pet. at 25; NAB Pet. at 18; INTV Pet. at 13. In *Southwestern*, the Court emphasized that it was not ruling on the validity of specific FCC rules for cable television. 392 U.S. at 167. Instead, the Court merely upheld the general authority of the FCC to regulate cable, in part because the FCC had "reasonably concluded" that regulation of cable was necessary to advance the FCC's mandate to foster a system of local broadcasting. 392 U.S. at 173-74. *See*

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*also FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979). Absent direct government intrusion via the must-carry rules, cable operators actively exercise editorial judgment in the choice and mix of broadcast stations they carry in conjunction with other cable programming sources. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986). In any event, the Cable Communications Policy Act of 1984 firmly establishes that cable is not a common carrier. 47 U.S.C. § 541(c).

47 U.S.C. § 307(b). What the Court did not do was address the constitutionality of must-carry rules (or any other FCC regulation); suggest that the governmental interest in local broadcasting was a statutory command for must-carry rules; or hint that the FCC was not free to reevaluate the competing interests raised by must-carry rules in light of changed circumstances and evolving technology.[4]

The FCC's abandonment of its earlier rationale for must-carry rules also makes illusory any supposed conflict between the Court of Appeals' decision and *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). In *Black Hills*, the Eighth Circuit upheld permanent must-carry rules purportedly designed to preserve local broadcasting.[5] 399 F.2d at 71-72. There can be no conflict between the *Black Hills* decision and the decision below because the two courts were analyzing different rules which the FCC sought to justify on the basis of differ-

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[4] These include, in particular, the development of cable television into a creator and distributor of its own programming and the continued development of UHF and educational broadcasting. Both developments have decreased any legitimate concern about the vitality of local programming, while cable's development as a programming source has elevated the First Amendment implications of must-carry rules. Furthermore, as the FCC found, must-carry rules impede other statutory goals including those set forth in the Cable Communications Policy Act, 47 U.S.C. § 521, enacted long after the decision in *Southwestern*. *See* P.A. at 233a.

[5] The Court's statement in *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972) (plurality) that *Black Hills* "correctly upheld" the must-carry rules was subsequently identified as *dicta* in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 n.7 (1979). In that same decision, the Court affirmed an Eighth Circuit decision in which the Court of Appeals itself undercut the precedential value of *Black Hills* by adopting reasoning inconsistent both with the earlier decision and with petitioners' current argument. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978). *See* P.A. at 139a n.134.

ent interests. *See Century Communications*, P.A. at 16a-18a & n.4.

Indeed, even *Quincy* did not foreclose FCC reliance upon the preservation of local broadcasting as support for must-carry rules. 768 F.2d at 1459. *Quincy* held merely that the FCC must supply appropriate support for any such rationale. *Id.* The FCC's subsequent rejection of the interests of local broadcasting as support for must-carry rules was an administrative determination of the sort petitioners elsewhere fervently support.[6]

The rationale that the FCC relied on to justify the temporary must-carry rules—the maintenance of programming diversity while a consumer misperception is corrected—raises no issue warranting this Court's attention. As the Court of Appeals found, there is no evidence or sound reasoning suggesting that either the problem exists or the proposed cure is appropriate. P.A. at 28a. But more importantly here, the identified problem (a consumer misperception) and solution (temporary must-carry rules) have anything but "profound implications for the regulation of electronic communications." NAB Pet. at 11.

The problem is one the FCC itself identifies as temporary and which by the inherent logic of its reasoning will be exacerbated, not solved, by continuing must-carry rules. *See* P.A. at 110a-11a. If any misperception ex-

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[6] It is well-established that an agency can change its interpretation of how best to further the governmental interests with which it has been charged after carefully reviewing evidence that circumstances have changed, a recognition that it is changing course and an explanation of the reasons for the change. *E.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 417-18 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

ists, five more years of must-carry rules will simply reinforce such a misperception and delay the use of input-selector switches. P.A. at 27a. At the same time, must-carry rules stand likely to decrease consumers' viewing options by requiring cable operators to provide programming available off-air at the expense of programming available only via cable.

The solution is one which each petitioner takes pain to describe as modest. UCC Pet. at 20; CPB Pet. at 21-22; NAB Pet. at 29; INTV Pet. at 18. The temporary must-carry rules apply to only some cable operators, benefit only some broadcasters, and would exist for only five years. P.A. at 180a-82a, 184a. Moreover the Court of Appeals never ruled that these or any other must-carry rules are *per se* unconstitutional. P.A. at 28a. It ruled only that the FCC must offer evidence in their support. *Id.* Thus, neither the fact that these temporary regulations were struck down by the Court of Appeals nor the reasoning used to achieve that result raises a substantial issue warranting review.

**II. No Substantial or Important Issue Concerning The Deference To Be Afforded Agency Discretion Is Presented.**

Each petitioner's request for review depends, in large measure, upon an effort to portray the Court of Appeals as having "substituted its judgment for that of the FCC." CPB Pet. at 17. *See also* NAB Pet. at 22; INTV Pet. at 18-19. Central to this effort is the petitioners' assertion that the substantial deference normally due agency factual determinations should be afforded to the FCC's decision even though it affects First Amendment rights. CPB Pet. at 17-22; NAB Pet. at 21-26; INTV Pet. at 19-22. Thus, the petitioners argue, the Court of Appeals erred when it invalidated the must-carry rules because the FCC "merely posit[ed] the existence of the disease sought to be cured" without adducing believable

evidence on the record. P.A. at 26a (quoting *Quincy*, 768 F.2d at 1455). *See* CPB Pet. at 12-17; NAB Pet. at 26-29; INTV Pet. at 19-23.

To the extent the petitioners assert that governmental actions affecting First Amendment rights should be accorded the same deference as actions involving purely technical matters, they are wrong. "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986). *Cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 77 (1981) (Blackmun, J. concurring) ("the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment").

Moreover, even deference to a supposed agency expertise could not save the FCC's actions in this case. In the absence of empirical evidence to the contrary, common sense dictates that people are able to quickly grasp the proposition that an antenna is necessary to receive over-the-air signals not carried on cable. No case cited by the petitioners suggests that without empirical evidence or at least sound reasoning an agency may base regulations burdening free speech on a counter-intuitive model of human behavior.

The only case cited by petitioners dealing in more than passing language with the level of deference to be paid to a governmental evaluation of the interests served by a regulation or statute affecting free speech is *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[7]

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[7] The majority of the cases petitioners rely upon either raised no First Amendment issue at all, (*E.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (decision to build interstate highway); *Vermont Yankee Nuclear Power Corp. v. Natural Re-*

The *Renton* Court recognized that a city was entitled to rely on studies and the experience of other cities to establish the substantiality of its governmental interest. 475 U.S. at 50-52. It did not hint that a city could rely on unsupported predictions and conjecture, as the FCC did. *Id.*

The petitioners also argue that the Court of Appeals erred in rejecting the FCC's selection of five year must-carry rules as the most appropriate mechanism to serve the governmental interest asserted. CPB Pet. at 18-22; NAB Pet. at 21-29. However, the Court of Appeals was careful to make explicit that "we do not base our decision on any judgment as to the relative desirability of these alternative proposals." P.A. at 27a-28a n.6. Rather, it focused, as *O'Brien* required, on whether the new interim must-carry rules were narrowly tailored to achieve the goals identified by the agency. P.A. at 26a-28a. The Court of Appeals' decision was, therefore, wholly consistent with this court's holdings in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) and *United States v. Albertini*, 472 U.S. 675, 689 (1985), that courts are not to choose the most appropriate method for serving a substantial governmental interest.

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*sources Defense Council, Inc.*, 435 U.S. 519 (1978) (licensing of nuclear reactors)) or did not involve a dispute over whether the governmental interest was substantial and threatened by the expressive activity regulated. *E.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. Albertini*, 472 U.S. 675 (1985). The dispute in the latter cases was over the constitutionality of the *mechanisms* chosen to serve the governmental interest. For example, the *Clark* Court assumed without debate the existence of a substantial governmental interest in protecting national parks and examined the asserted justification for the mechanism relied upon by the government to serve that interest. 468 U.S. at 296, 299. The *Albertini* Court also assumed a governmental interest in maintaining the security of military installations and examined the governmental mechanism used to protect the military base at issue. 472 U.S. at 688-89.

Petitioners' final argument is that the Court of Appeals erred in its review of the administrative record. CPB Pet. at 12-14; NAB Pet. at 26-29. However, the responsibility for assessing a record to determine whether agency findings are supported by the evidence is "primarily" that of the Court of Appeals: "This Court will intervene only in what ought to be the rare instances where the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

Even a brief review of the record demonstrates that this case is far from the rare instance in which review is warranted. There was no evidence or plausible reasoning to suggest that cable subscribers will need five years—enough time for a sixteen year old to not only learn to drive but also to graduate from college—to learn that they must use a switch to turn to off-air reception and an antenna to receive broadcasts by local television stations not carried on their cable system.[8] Instead, as

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[8] CPB claims the Court of Appeals ignored another FCC justification for the five-year rules—that technical improvements were necessary for input-selector switches. CPB Pet. at 13-14. CPB cites for this proposition the FCC *Report and Order*, P.A. at 128a. The FCC essentially repudiated this point on reconsideration, when it held current switches to be adequate to the job with "relatively minor modifications." *See* P.A. at 236a. While the other petitioners claim switches will never work, this argument, of course, conflicts with their fervent support for FCC expertise elsewhere. UCC Pet. at 14 n.18; NAB Pet. 25-29; INTV Pet. at 24-25. In any event, at the time the FCC adopted its input-selector switch rules, it instituted a proceeding to establish technical standards for them and has now issued a Report and Order in that proceeding. None of the petitioners other than CPB participated in that proceeding, where issues about the technical performance of input-selector switches could have been raised, and they should not be heard to complain now about the technical capability of those switches. *See Report and Order*, Gen. Docket No. 87-107, 2 FCC Rcd 7231, 7238 (1987) (list of commenting parties).

the Court of Appeals pointed out, the FCC itself supplied evidence that such a five-year tutorial was not necessary because consumers were already becoming accustomed to switching between alternative program input sources. P.A. at 23a-24a.[9] Indeed, a five-year transition would only delay the "inevitable, but almost certainly brief" period during which cable subscribers were weaned from reliance on must-carry rules.[10] P.A. at 27a.

The Court of Appeals was also correct in refusing to credit the FCC's assumption that, in the absence of must-carry rules, cable companies would cease carriage of significant numbers of local broadcast stations—despite the fact that cable operators had not done so in the 16-month period between the *Quincy* decision and the time the temporary must-carry rules became effective.[11] P.A.

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[9] Although not mentioned by the Court of Appeals, Mr. Leghorn pointed out in his pleadings that the FCC's rationale also contradicted explicit findings in other proceedings by the FCC, based on "considerable evidence," that viewers already take "significant measures," such as improved antennas, to receive desirable television signals if they do not receive them via cable service. *Report and Order* in MM Docket No. 84-1296, 58 Rad. Reg.2d (P&F) 1, 28 (1985), *remanded on other grounds sub nom., American Civil Liberation Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied sub nom., Connecticut v. FCC*, 56 U.S.L.W. 3644 (1988).

[10] Petitioners continue to argue that cable television systems are "gatekeepers" that block access to off-air television reception. *See* CPB Pet. at 22-23; NAB Pet. at 12. The FCC explicitly rejected this notion. It held that the "gatekeeper" sobriquet was the result of the FCC's prior must-carry rules, which gave cable subscribers no reason even to attempt to receive off-air local television broadcast signals. P.A. at 99a. The root purpose of the FCC's input-selector switch rules is to ensure the continued availability to cable subscribers of off-air broadcast signals that are not carried by cable systems. P.A. at 109a-10a.

[11] Some petitioners argue that a significant number of broadcast signals were deleted by cable systems when must-carry rules were first held unconstitutional. UCC cites press reports that 196 noncommercial stations were dropped. UCC Pet. at 16-17 n.21. INTV cites an earlier CPB pleading to claim 185 cases of public stations

at 25a. The FCC itself appears uncertain of its own data on this point because, without waiting for the results of petitions before this Court, it has already commenced yet another proceeding to obtain evidence whether broadcast signals have been dropped by cable systems and what harm might arise from such a result. *Notice of Inquiry*, MM Docket No. 88-138, adopted March 24, 1988 (FCC Rep. No. DC-1134).[12]

In short, by any standard except blind deference to administrative determinations, the FCC simply failed to justify under the *O'Brien* standard any rationale for its temporary must-carry rule. Thus, the Court of Appeals' treatment of the *O'Brien* standard violates no constitutional principles and raises no important or substantial issue this Court should review.

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being deleted. INTV Pet. at 17 n.32. Neither CPB in its brief nor the FCC in its decisions relied on these figures. In the proceedings below, the National Cable Television Association ("NCTA") analyzed the alleged instances of noncommercial stations being deleted and pointed out that the numbers were unreliable. These numbers counted many stations that *never had* been carried, *were not entitled* to carriage under the old rules or had even *requested* deletion. Reply of NCTA in MM Docket No. 85-349, March 2, 1987 at 6, n.5 and Attachment B (Court of Appeals J.A. at 618, 625-29).

[12] The fact that the FCC is currently in the process of seeking to gather the evidence it lacked in this proceeding and has not yet received, much less evaluated comments in that proceeding, is alone a sufficient reason for denying the petitions now before this Court.

## CONCLUSION

The petitions should be denied.

Respectfully submitted,

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Nos. 87-1487, 87-1506, 87-1510, and 87-1551

# In the Supreme Court of the United States

OCTOBER TERM, 1987

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OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

---

CORPORATION FOR PUBLIC BROADCASTING, ET AL., PETITIONERS

*v.*

CENTURY COMMUNICATIONS CORP., ET AL.

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NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

*v.*

CENTURY COMMUNICATIONS CORPORATION, ET AL.

---

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., PETITIONER

*v.*

CENTURY COMMUNICATIONS CORPORATION, ET AL.

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS

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CHARLES FRIED
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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-1487

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

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No. 87-1506

CORPORATION FOR PUBLIC BROADCASTING, ET AL., PETITIONERS

*v.*

CENTURY COMMUNICATIONS CORP., ET AL.

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No. 87-1510

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

*v.*

CENTURY COMMUNICATIONS CORPORATION, ET AL.

---

No. 87-1551

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., PETITIONER

*v.*

CENTURY COMMUNICATIONS CORPORATION, ET AL.

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**MEMORANDUM FOR THE FEDERAL RESPONDENTS**

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In this case, the court of appeals held unconstitutional the interim "must carry" rules of the Federal Communications Commission (Commission or FCC). Under those rules, cable television systems are required to retransmit certain broadcast signals for a limited period while the public learns that it can receive broadcast signals that are not carried by a cable operator. Although the Commission presented substantial arguments in support of the validity of the rules in the court of appeals, we cannot say that that court's judgment striking down these particular interim rules is of sufficient practical importance or legal significance to warrant this Court's review.

1. In the mid-1960s, the FCC adopted broad "must carry" rules applicable to all cable operators in the country (Pet. App. 36a-37a). Those rules required cable operators to carry the signals of local broadcast television stations. The Commission believed that the rules were needed to protect local broadcasters from the competition of cable companies (*id.* at 39a). In *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986), the court of appeals held that the FCC's broad must-carry rules were invalid under the First Amendment. The court stated that "in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat" (768 F.2d at 1459).

In light of the *Quincy* decision, the Commission commenced a rulemaking proceeding to consider whether to adopt new must-carry rules. In its *Report and Order* (Pet. App. 32a-204a), the Commission announced that its primary policy is to "maximize[ ] diversity and choice in television service" (*id.* at 94a). With this policy in mind, the Commission reasoned that "it is no longer appropriate

or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television services from competition with cable service" (*id.* at 97a). Rather, the Commission believed that consumer choice would be maximized if cable companies are free to select their own programs and cable subscribers are free to receive off-the-air signals by means of an antenna (*id.* at 102a). Accordingly, the Commission concluded that "must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals" (*id.* at 111a).

Nevertheless, the Commission believed that some short-term regulation was needed to correct a consumer "misperception"—*i.e.*, that "their only means of access to off-the-air signals is through their cable service" (Pet. App. 99a). To remedy this problem, the Commission adopted a rule requiring "cable companies to provide their subscribers with input selector switches"—so-called "A/B switches"—"that will enable reception of broadcast signals by means of an antenna" (*id.* at 110a).[1] In addition, "out of an abundance of caution and concern" (*ibid.*), the Commission adopted interim must-carry rules. The Commission concluded that these limited must-carry rules are needed while cable subscribers learn that they can receive any off-the-air signal by means of installing an A/B switch and an antenna. Under these rules, which expire five years after promulgation (*ibid.*), cable systems with 21 channels or more must devote a portion of their channels (generally 25%) to local broadcast signals (*id.* at 120a).[2] Cable

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[1] The Commission also adopted a rule requiring cable operators to "inform subscribers of the changes in the regulations concerning the carriage of broadcast signals and of the need for input selector switches" (Pet. App. 113a).

[2] Cable systems with 20 or fewer channels need carry only one educational station (Pet. App. 119a-120a).

systems need not carry two stations affiliated with the same network nor stations that attract only a small number of viewers (*id.* at 117a, 121a).

The Commission rejected constitutional and statutory challenges to its interim must-carry rules. Analyzing the rules under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the Commission stated that the "rules * * * satisfy the requirements of the First Amendment" (Pet. App. 154a, 158a). The Commission further concluded that the interim must-carry rules are consistent with the Cable Communications Policy Act of 1984 (47 U.S.C. (Supp. III) 521 *et seq.*), and "are not a 'taking' against private property for public use without compensation" (Pet. App. 158a).

2. On review, the court of appeals held that the Commission's interim must-carry rules violate cable operators' rights under the First Amendment (Pet. App. 28a).[3] The Court scrutinized the rules under its reading of the constitutional test announced by this Court in *O'Brien*—whether the rule advances a "substantial governmental interest" with an incidental restriction on speech that "is no greater than is essential to the furtherance of that interest" (391 U.S. at 377).

For several reasons, the court of appeals concluded that the record did not support a finding that the Commission's interim must-carry rules advance a substantial governmental interest. First, the court stated that there is "scant evidence" for the FCC's judgment that there is a widespread misperception that the only means of receiving off-the-air signals is through a cable system (Pet. App. 19a). Second, the court noted that the record did not support the Commission's "assumption" that cable companies would not carry local broadcasts without must-carry rules

[3] The court of appeals did not address the statutory and Fifth Amendment challenges to the interim must-carry rules.

(*id.* at 25a-26a). Lastly, the court of appeals held that the record did not justify a conclusion that the must-carry rules are narrowly tailored (*id.* at 26a-28a). The court observed that the "FCC adduces literally no evidence that this [interim] period must last for fully five years" (*id.* at 26a).[4]

3. This case does not warrant further review. The court of appeals applied the constitutional test (*O'Brien*) advanced by the Commission. In applying that test, the court of appeals may have imposed an excessively stringent evidentiary burden on the Commission to justify its interim must-carry rules. Compare *United States* v. *Albertini*, 472 U.S. 675 (1985); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984). In the context of this case, however, this limited legal dispute—concerning deficiencies found by the court of appeals in this particular administrative record—does not warrant this Court's attention.[5]

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[4] The court of appeals did not invalidate the Commission's rules concerning A/B switches and subscriber education. Pet. App. 31a.

[5] Moreover, there is no relevant conflict in the circuits. As a practical matter, the court of appeals' decision in this case has nationwide effect by setting aside the Commission's interim must-carry rules for the remainder of their intended five-year duration. And it is not clear that any other circuit would have reached a different decision in this case. Petitioners cite *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (1968), for the proposition that the Eighth Circuit believes that the First Amendment imposes virtually no constraints on the Commission's regulation of the content of cable signals. But in *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025 (1978), aff'd, 440 U.S. 689 (1979), the Eighth Circuit cast doubt on its *Black Hills* decision. The court stated that "we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access" (571 F.2d at 1056).

The Commission adopted the must-carry rules for the sole purpose of ensuring access to local broadcasts while cable consumers are informed that they may receive off-the-air signals by installing an A/B switch and an antenna.[6] The Commission, however, has very little data indicating that consumers need years to gain this knowledge. Moreover, there are certainly many cable subscribers who also have television sets that are not connected to the cable system; those subscribers can receive broadcast signals simply by viewing their unconnected sets without installing an A/B switch. In addition, there is force behind the court of appeals' suggestion (Pet. App. 27a) that cable subscribers will have greater incentive to buy and install an A/B switch when there are no must-carry rules and if cable companies actually stop carrying local broadcast stations.[7]

There is also little basis, at this time, for concluding that local broadcasters will suffer from the lack of must-carry rules. As the Commission noted in its *Report and Order*,

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[6] There is no basis for the suggestion of petitioner Office of Communication of the United Church of Christ (87-1487 Pet. 11-17) that the Communications Act of 1934 (47 U.S.C. (& Supp. III) 151 *et seq.*) requires the Commission to readopt broad must-carry rules to protect local broadcasters from competition. The Communications Act (which, of course, was enacted prior to the development of either television or cablecasting) delegates to the Commission the task to "make available * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (47 U.S.C. 151). In fulfilling that mandate, the Commission has determined that broad must-carry rules are no longer desirable. The Commission's judgment in this matter is entitled to "substantial judicial deference." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

[7] Indeed, while must-carry rules are in effect, the main incentive to buy an A/B switch may be to have access to broadcast signals in the event that cable service is disrupted.

"existing empirical data concerning the actual effects of deletion of the must carry rules on signal carriage is sparse" (Pet. App. 149a n.159). The one fact that "is clear from the record" is "that cable systems do have incentives to carry broadcast stations" (*id.* at 102a). Indeed, the record indicates that, during the 16 months between the court of appeals' *Quincy* decision and the Commission's imposition of the interim must-carry rules, cable operators generally did not stop carrying local broadcast signals (*id.* at 25a).

The court of appeals' decision gives the Commission an opportunity to observe how broadcasters and the cable industry will operate without must-carry rules. And the Commission is taking advantage of that opportunity. The Commission recently began an inquiry concerning the effects of the absence of must-carry rules. See *Notice of Inquiry*, MM Dkt. No. 88-138 (Mar. 24, 1988). The Commission is seeking data about whether cable operators have stopped carrying broadcast signals and whether cable operators are charging broadcasters fees to carry their signals. The court of appeals did "not suggest that must-carry rules are *per se* unconstitutional" (Pet. App. 28a). Thus, if experience (as opposed to a prediction) proves that must-carry rules are needed to advance valid public interests, the Commission may build a record supporting new must-carry rules and defend those rules in the courts. In these circumstances, the question of the validity of the Commission's interim must-carry rules, which were "adopted out of an abundance of caution" (Pet. App. 110a), does not warrant this Court's review.

Respectfully submitted.

CHARLES FRIED
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Nos. 87-1487, 87-1506, 87-1510, and 87-1551

IN THE

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OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF
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v.

FEDERAL COMMUNICATIONS COMMISSION and
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*Respondents,*

CORPORATION FOR PUBLIC BROADCASTING, *et al.*,
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CENTURY COMMUNICATIONS CORPORATION, *et al.*,
*Respondents,*

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v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*
*Respondents.*

**On Petitions for Writs of Certiorari**
**To The United States Court Of Appeals**
**For The District Of Columbia Circuit**

## JOINT REPLY BRIEF OF PETITIONERS NAB AND INTV

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IN THE

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v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*, *Respondents*,

**No. 87-1506**

CORPORATION FOR PUBLIC BROADCASTING, *et al.*, *Petitioners*,

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FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*, *Respondents*,

**No. 87-1510**

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*,

v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*, *Respondents*,

**No. 87-1551**

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., *Petitioner*,

v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*, *Respondents*.

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**On Petitions for Writs of Certiorari to The United States Court of Appeals for The District of Columbia Circuit**

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## JOINT REPLY BRIEF OF PETITIONERS NAB AND INTV

Less than three years ago the Solicitor General urged this Court not to address what he characterized as the "sensitive constitutional issues" posed by the then only lower court decision to hold that the FCC's longstanding "must carry" rules were invalid under the First Amendment. Memorandum for the Federal Respondents, p. 5, November 1985, in *National Association of Broadcasters* v. *Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986) (No. 85-502). At that time the Solicitor General argued that: (1) the lower court had left open the possibility that the FCC could craft new rules that the Court of Appeals would accept, (2) the FCC had concluded that it preferred to explore the possibility of such new rules rather than seeking to overturn the lower court decision and had recently issued a rulemaking notice to that effect and (3)

> "[i]f the Commission issues new must-carry rules, the constitutionality of those rules will be addressed by the court of appeals in the first instance. This Court then would have an opportunity to consider the issues raised by petitioners in the context of rules that the FCC considers necessary to further the public interest."

*Id.* at pp. 4-5. Some six months later, this Court denied the petition in that 1985 case. *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Now the Solicitor General's 1985 prerequisites to review by this Court of the underlying "sensitive constitutional issues" have all been realized. The FCC devoted much of 1986 and the first half of 1987 to an effort to craft new must carry rules it thought would satisfy the *Quincy* panel. The constitutionality of those new rules has now been

addressed by the D.C. Circuit in the first instance. And so, this Court now has the opportunity to consider the "sensitive constitutional issues" raised by the *Quincy* petitioners, this time "in the context of rules that the FCC considers necessary to further the public interest."

Nonetheless, the Solicitor General has decided not to follow the recommendation of the FCC to seek a writ of certiorari and counsels once again against review by this Court, even though he evidently would contend that the lower court was clearly wrong in the way it applied the *O'Brien* test.[1] He asserts that the present case does not have "sufficient practical importance or legal significance" and amounts to only a "limited legal dispute" not warranting this Court's attention. Memorandum for the Federal Respondents, pp. 2, 5, May 1988.

Such a characterization of this case by the Solicitor General is puzzling. The lower court has now twice declared unconstitutional longstanding FCC rules which this Court previously held the agency had the statutory authority to adopt. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Thus the lower court's result is tantamount to one of those relatively

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[1] United States v. O'Brien, 391 U.S. 367 (1968). The Solicitor opines that the "court of appeals may have imposed an excessively stringent evidentiary burden on the Commission to justify its [new] interim must-carry rules" citing two recent decisions of this Court. Memorandum for the Federal Respondents, pp. 2, 5, May 1988. Although called to the lower court's attention, those two cases were simply ignored by the D.C. Circuit. *See* NAB Pet., pp. 23-24; INTV Pet., pp. 20-21. Apparently in the D.C. Circuit, as matters now stand, United States v. Albertini, 472 U.S. 675 (1985), and Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), have no force or effect.

infrequent decisions in which Federal legislation is held unconstitutional, and as to which there is a strong presumption in favor of review by this Court. *Cf.* 28 U.S.C. § 2101(a) (1982).

If the only issue presented by the petitioners in this case were the lower court's refusal to follow this Court's recent precedents applying *O'Brien*, perhaps a summary reversal and remand on the certiorari papers might well be more efficient than plenary review by this Court. But serious though it certainly is, the lower court's failure to follow this Court's recent teachings concerning the *O'Brien* standard is by no means the only or even most important issue raised by the petitions in the instant case. In addition, there are those "sensitive constitutional issues," as the Solicitor characterized them in November, 1985, pertaining to Federal authority to regulate the use of broadcast signals by cable television systems, which the lower court's decision in this case once again poses.[2]

The Solicitor General also counsels against review in this case on the basis of a now all too familiar refrain: The lower court's decision addresses rules that were only "interim" in nature,[3] and does not

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[2] *See* Pet. App., pp. 14a-18a; NAB Pet., pp. i, 11-21; UCC Pet., pp. i, 17-23; *see also* Joint Pet. of NAB and Association of Maximum Service Telecasters, Inc., pp. i, 8-18, Sept. 23, 1985, in National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986) (No. 85-502).

[3] The FCC's new rules were scheduled to remain in effect for five years, until June 10, 1992.

prohibit an FCC attempt to develop yet another set of must carry rules through yet another rulemaking proceeding that might pass muster in the court of appeals; indeed, the FCC has initiated an inquiry to collect data regarding the availability of broadcast signals on cable television systems in the wake of the elimination of the Commission's must carry rules. May 1988 Memorandum, p. 7.[4]

The principal flaw in this argument is that *Quincy* and now its progeny constitute a serious impediment to sound policymaking, whether by the FCC or by Congress, because both those bodies must assume, until this Court resolves the matter, that the D.C. Circuit's view of the First Amendment is correct. Indeed, in this very case the FCC's effort to accommodate *Quincy* became the basis on which the lower court overturned the new rules. From the outset to the conclusion of its 1986-87 rulemaking the FCC struggled to find a rationale for regulation that the *Quincy* panel might accept.[5] Ultimately it concluded, rightly or wrongly, that *Quincy* dictated adoption not

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[4] As the FCC's recent *Notice* makes clear, the effort to gather additional data pertaining to must carry stems from a Congressional request that the agency undertake that information-collecting task. That request is only one manifestation of ongoing Congressional interest in the must carry issue. *See also* H.R. 4293, 100th Cong., 2d Sess. (1988). But the FCC *Notice* provides no indication that the FCC, like the hapless but ever optimistic would-be place kicker in the comic strip, is willing to run up to the ball once again based on the assurances of the impish little girl that next time she might not yank the football away at the last moment. Even if the FCC were willing to try again, it ought to do so with a definitive resolution of the constitutional issues that only this Court can provide.

[5] *See* INTV Pet., pp. 23-25.

only of rules that were much narrower substantively, but also that would have only a limited duration.[6] To justify rules of limited duration, the FCC theorized that must carry requirements could become unnecessary if cable television subscribers received "consumer education" notices and A/B switches from cable companies, even though the Commission had found A/B switches inadequate only two years earlier. The FCC explained this conversion by citing its "search for acceptable solutions . . . in the post-*Quincy* environment." Pet. App., p. 127a. The FCC also read *Quincy* as requiring the agency to forsake entirely its longstanding rationale for must carry rules—*i.e.*, the agency's statutory responsibility to foster and safeguard the public's unfettered access to locally oriented television broadcast service. The FCC certainly can be accused of being too optimistic in relying upon A/B switches and in hoping that cable companies, entities that have every economic incentive to perpetuate dependence on cable reception, could be compelled to eliminate that dependence.[7] But standing alone, the FCC's suppositions along these lines were harmless enough because when the FCC's hopes proved to be misplaced, new regulatory action could be taken to extend the rules beyond the initial five-year period.

The Court of Appeals, however, treating as established fact the FCC's suppositions about the possibility of overcoming the competitive disadvantage imposed on broadcast stations that are excluded from cable retransmission, and freely substituting its own predictive judgments and findings of fact for those

[6] Pet. App., pp. 151a-154a, 247a-248a.

[7] *See* INTV Pet., pp. 26-27.

of the agency on other issues, found the so-called interim rules unconstitutional.

The ironic aspects of this spectacle, however, are more than offset by the sobering consequences for the American public, and for what is "demonstrably a principal source of information and entertainment for a great part of the Nation's population." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). Cable television systems—on which over half the American public now relies for television reception—stand as a gateway between their customers and each and every one of the local television broadcast stations licensed to serve the public. Any broadcast station that is not carried on cable is at a severe competitive disadvantage vis-a-vis other broadcast stations and such other sources of television news and information as the cable operator may select for transmission into American homes. Only four years ago this Court observed that the must carry rules addressed this important issue by "attempt[ing] to strike a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984).

Although the lower court stated that it has not created a totally impenetrable barrier to governmental regulation aimed at limiting the power of cable operators to act as private censors of local commercial and noncommercial educational television service,

*Quincy* and the decision below greatly complicate the task of the FCC and those in Congress who see the better policy as one which assures the availability of multiple sources of television service which are not dependent on cable television operators for access to viewers. The D.C. Circuit's barriers to regulation rest on a suspect platform, one that is inconsistent with numerous decisions of this Court[8] and in direct conflict with a prior Eighth Circuit decision which this Court later described as having "correctly upheld" the must carry rules in the face of a First Amendment challenge.[9] The issues raised by the petitions have enormous public importance. Those issues are not likely to go away, because both the FCC and the Congress must continue to be concerned with the threat posed by any enterprise that becomes a single source for television service in the United States. To date the FCC, the Congress and the public have not had the benefit of an authoritative resolution of the

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[8] *See* INTV Pet., pp. 12-16, 20-21; NAB Pet., pp. 12-19, 22-24; UCC Pet., pp. 18-23; CPB Pet., pp. 14-21, 25-26.

[9] United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972) (plurality opinion). The Solicitor urges that there is no conflict with Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), because subsequently the Eighth Circuit "cast doubt" on its *Black Hills* decision. May 1988 Memorandum, p. 5, n.5. However, the Eighth's Circuit's subsequent discussion of *Black Hills* was in the context of regulations mandating cable access for nonbroadcast services; the Eighth Circuit held that such rules were outside the FCC's statutory authority because they bore no nexus to broadcast signal retransmission which *was* within the FCC's authority. *See* Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). This Court also recognized that critical distinction in affirming the Eighth Circuit. *See* 440 U.S. at 700.

underlying constitutional issues, and only this Court can provide that resolution.

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